













WILLIAM F. HOBBS, doing business as WILLIAM F. HOBBS & CO.

Appellee.

APPEAL FROM

SUPERIOR COURT.

GOOK COUNTY.

AB.

MCMARCH REFRIGERATING COMPANY.

Appellant.)

200 I.A. 1

MR. JUSTICE C*CONSER delivered the opinion of the court.

Appellee filed a bill against the appellant praying for an accounting. From a decree awarding the appellee \$4328.70, appellant prosecutes this appeal.

sustain the material allegations of the bill; that there is a variance between allegations of the bill on the one hand and the findings of the master and decree of the court on the other, and that this variance violates the elementary rule that the allegations of the bill, the proof, and the decree must correspond, and therefore constitutes reversible error. It is argued that the principal material allegation of the bill was the fraudulent representation made by appellant to the appellee that his poultry was wholly destroyed and that he discovered this after the settlement hereinafter mentioned, and that there is no preef to sustain this allegation, and no such finding in the master's report or in the decree.

Appellant was engaged in the public warehouse and cold storage business, and appellee in the wholesale produce and commission business, dealing principally in poultry. Prior to March 19, 1911, appellee delivered to

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Appullate was empaged in the public estancesses and cold express includes, and appulled in the employed an process and oppullate in the desired in public, fried in Anna 19, 1911, appulled delivered as

the appellant for storage morchandies consisting chiefly of poultry, of the value of more than \$21,000. When the poultry was delivered to appellant it issued its warehouse receipts to appelled, also an insurance certifionte wherein the appellant agreed to insure the poultry for the full amount of such insurance certificate, the policy to be payable to appellant as trustee for appellee: and in case of loss by fire, appellant was to not as agent for appolled in the collection of the insurance. On said date appollant had lenged to appelled insurance cortificates amounting to \$18,500. Appellant paid the premiums and dobited appelles with the same. Appelles was indebted to appollant on Various motos ecoured by the poultry stored in the warehouse, the notes aggregating \$12133, and there was a further indobtedness of SllY5.41. On March 19. 1911. a fire started on the 5th floor of the parcheuse, which was a Totory and becoment building. At the time there was stored in the warehouse 2,280,410 pounds of butter and 1,033,960 pounds of poultry, belonging to different persons including appellee. All of the poultry and butter was destroyed or damaged by fire and water, and appellant proceeded to adjust the loss with the insurance companies. Appollee was disentisfied with the proposed adjustment and employed an insurance adjuster; appellant also employed an adjuster. The adjustment was carried on and an agreement reached with the insurance companion by the appellant alone. The insurance collected on appellec's property amounted to \$11,231.63. Appellee objected to the amount of the settlement, but was informed by appellant that a settlement had been made, and on August 16, 1911, after deducting the amount due and owing from appelles, appellant paid appelles thebalance ascenting



out route and the range want want to outer out to averthing to affilings near wast to call published or exalience on which eds . of an Italy assessment form to sense Eigh out was endantitions abstract religion of open and statio of state monomitted to singers, an ellers poid the proclams and doe regit den regense met en renge en en en en rengentense det er a far renared on the Sal Sale of the renaments. Dec. 150. I see agains to already this init a considerate out at mailulant arrang durantities of maintained agains to comme adjusticed was derried on and an agreement received with the Leadingon dispendion by the appoint alone. The implication .75.202, LIS as between grasques afaciliante en beterline

to \$2110.53, and took a restipt shick one "in full of all slocks and at made a start the temptoh Hefrigerating lampany around out of the tire of each 10, 1911." after the fire appellee received from appellant certain of the damped poultry but me unable to dispose of all of it and returned the balance. Appellant then disposed of all of the salvege, celling 497.561 pounds of damped poultry for \$45.399.26, or an average of 0.2 cents per pound. So record was kept by appellant from which can be accertained the prices and ascent received for appellace's disaged poultry, 91.001 counds of which was included in the above salvage.

The master found that appellant was liable for appelled's poultry unaccounted for at the everage price of 0.2 sents per pound, or \$3435.57. This mount added to the insurance collected made a total amount due and owing from appellent to appelled of \$19.667.20. An elled had received \$15.618.94, which left a belonce of \$4348.26, with int rest from august 16, 1911, for which amount the decree was entered.

Appellant contends that as appelles was experienced in hamiling poultry and was represented by an able fire insurance adjuster, the settle and made August 16, 1911, is conclusive and binding. The master found that at the time of the execution of the receipt by appelles, as above mentioned, he knew that all of his property had not been accuraged by fire; that appelles a popular and had sold some of appelles a; that appelles did not know the amount of money received by appellant from the insurance companies on appelles a property, and

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did not know the prices at anich appellant was celling
the damaged poultry nor the assumt of soney it realized
from the sale of the same; that appellant never rendered
to appelled any statement showing the assumt of insurance
or the assumt of money received from the sale of the damaged
poultry. This finding is concurred in by the chancellor and
is supported by the evidence.

The allegations of the bili, so far as material to the point under consideration, were that appellant represented that all of appellee's poultry had been destroyed by the fire and this was discovered only after the settlement; that it adjusted the loss with the insurance companies for more than \$15,000 and deducted from this sum the assumt due appellant and paid appellee the blance; that these representations were false and fraudulent and that appellant cold and disposed of appellee's merchandise for more than \$24,000 and retained the proceeds thereof.

that appelles's property was shally destroyed and that appelled that appelles's property was shally destroyed and that appelled descovered this was antrue only after the settlement, is not sustained by the evidence; on the centrary, the undisputed evidence is that appelles knew long before the settlement that not his poultry had/been totally destroyed. However, we are clearly of the opinion that this variance is not of such a substantial nature as to warrant a reversal of the decree. Appellant does not cantend that there we no allegation in the bill to sup ort the finding that appelles old not know the amount of insurance collected by appellant or the amount which appellant received for the salvage. It is conceded that appellant acted as trustee for appelled, and as such must show the utmost good faith in the settlement. "Transactions between a party

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and one bearing a fiduciary r lation to him ere upon his motion prime facts voidable upon grounds of public policy. and the burthen of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence, by establishing the fact that the party seted upon competent and independent advice of another, or such other facts as will satisfy the court that the dealing was at arm's length, or he must show that the transaction was had in the most perfect good faith on his part and was equitable and just between the parties."

Themas y. Whitney, 185 ill. 225.

where a fiduciary relation exists, it is not necessary to cotablish intentional oractual fraud in order to set aside a contract. Beach v. silten, 244 111. 415.

Appellant appears to have conceived that it had the right to settle with appellace by paying him the value of the salvage as agreed between the insurance companies and appellant, and that appellant could then dispose of the salvage and retain any profit it might be able to make.

The case at bar, the fiduciary/being adaltted it was the duty of the appellant to advise appelles of the amount of insurance it had obtained from the impurance companies, and the amount it was receiving for the salvage. It having failed in this regard, the court properly set saide the settlement of August 16, 1911.

Appellant also contends that the court erred in computing the amount which appellant was decreed to pay in the price per pound allowed for the salvage and the number of pounds thereof. Under the facts in this case,

e name a ser est en la grid allas e la classifica e que montre tibble de la tensión. La transportación de la tensión de disposar en la constitución de la desta de la tipo menom

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the burden of establishing the number of pounds of salvage sold by appellant and the prices received therefor was upon the appellant. Thinks v. Whitney, supra: 39 Syc. 476.
Having failed in this regard it cannot now be heard to complain.

Finding no reversible error in the record, the deree of the uperior leart of Cook County is affirmed.

AFFIRM D.



APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

DR. H. J. SMEDLEY Appellant.

200 I.A. 6

MR. JUSTICE O'COMMOR delivered the opinion of the court.

This appeal is prosecuted to reverse a judgment of the aunicipal Court of Chicago for \$531.02, in favor of appellee (plaintiff) and against the appellant (defendant). The parties will nervine for be designated plaintiff and defendant as in the court below.

Plaintiff was the owner of a series of notes aggregating \$8.200.00, which were secured by a cortgage on certain lands in the State of Monigan. The Statement of claim set up a written contract between the parties whereby the defendant, in consideration of the extension of the time of payment of one of the notes, assumed and agreed to pay said note; the interest on all of the notes outstanding and the taxes for the year 1913 on the acrtgaged lands.

Defendent having defaulted in the payment of the taxes and the interest on the notes remaining unpaid, this suit was brought.

The defendant filed an affidavit of merits, and a statement of set off for plic. OC. The plaintiff then filed an affidavit of merits to the offendant's statement of set off. Afterwards, on motion of the plaintiff, the defendant's affidavit of merits and statement of set off

were stricken from the files, and the defendant was given leave to file an amended affidavit of merits and statement of set-off within 10 days. The defendant afterwards filed an amended affidavit of merits, which was also stricken from the files on metics of the plaintiff. At the same time the sourt desied the motion of the defendant for leave to file an amended statement of set-off, and judgment by default was entered against the defendant for the amount of plaintiff's claim.

The defendant contends that the sourt erred in striking his statement of set-off from the files.

It is a sufficient answer to this contention to say that the action to strike defendant's statement of set-off from the files, and the order of court entered thereon, are not contained in the bill of exceptions.

The point is not, therefore, preserved for review. Hann v. Brown, 263 ill. 394. Furthermore, defendant did not elect to stand by his statement of set-off but asked for and was given leave to file an amended statement of set-off. Any error committed was waived and he cannot now be heard to complain. Secand Sational Bank v. Glaney, 178 Ill. App. 427; Allen v. Houhan, 175 Ill. App. 386.

The defendant next centends that the court abused its discretion in denying defendant's motion for leave to file an amended statement of set-off. The order of the sourt granting the defendant leave to file an amended statement of set-off within 10 days was entered octaber 10, 1914, and there is no claim that any further extension of time was ever asked for or granted by the court. On the 16th day

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thereafter. November 5. 1914, the defendant presented his amended statement of set-off and moved the court for leave to file the same instanter. So excuse is effected for the failure to file the amended statement within the time allowed. We are therefore clearly of the opinion that there was no abuse of discretion in the sourt's refusing to grant defendant's motion.

Lorsover, we are of the opinion that the amended statement of set-off did not present a claim proper to be urged by way of set-off. The items set forth thereis are as follows: Keep, care and feed of one horse on farm 6 mes. . 330 per mo. . \$130; care and feed of one collie dog on farm 6 mos., \$15 per mo., \$90; storage of wine. S mos., 430 per me., 4240; use of part of house and storage of furniture, 6 mos., 3100 per mo., 3600; total, 4100. From this it clearly appears that the claim did not arise out of the contract and sued upon by the plaintiff, and unless it is for liquidated damages, it cannot be urged by way of set-off. De Forrest v. Cder. 42 all. 500; Highbie v. Bust, 211 111. 333; Clause v. Bullock Frinting Co. 118 Ill. 612. It is alleged that the plaintiff accepted the services performed by the defendant, but it is not alleged that the plaintiff agreed to pay the prices set forth in the statement of set-off. Wanifestly, the defendant was seeking to recover on an implied centract and could MEX recover only for the reasonable value of the services rendered, which was a question to be determined from the evidence. The claim was for unliquidated damages, (Ideal Conted Paper 30. v. Supples invelope 20., 169 ill 484; Kelley Baus & Co. y. Caffrey, 79 111. App. 278; Nobison v.

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Hibbs. 48 Ill. 408; Charmley v. Sibley. 20 C. C. A., 157.) and leave to file it was, therefore, properly refused.

davit of merite alleged facts which constituted a defense to plaintiff's claim. It set up that defendant was a mere guaranter of the payment of the several sums specified in the contract succ on, and that the plaintiff had made no effort to collect from the principal debtors, or realize the amounts due out of the security, which was more than sufficient to pay the amount recaining unpaid. The contract expressly states that "Dr. b. J. Smedley hereby assumes and agrees to pay" the several sums therein mentioned. This language is clear and unambiguous, and is not succeptible of the interpretation put upon it by the defendant. The defendant was primarily liable and the amended affidavit of merits was therefore properly stricken from the files.

Finding no reversible error in the record, the judgment of the municipal Court of Chicago will be affirmed.

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CHICAGO RAILWAYS COMPANY SAM)
CHICAGO CITY RAILWAY COMPANY)
(impleaded with Rittenhouse)

& Embree Company).

COCK COUNTY.

200 I.A. 9

Mm. JUTID OF COMMON delivered the opinion of the court.

This was an action on the case brought by the appellee against the appellants and Aittenhouse & Ambroe Co. to recover for personal injuries. A judgment was entered for \$3000 in favor of the appellee against the appellants. The jury returned a verdict of not guilty as to the defendant Mittenhouse & Mabroe Co. For convenience, the parties will be designated plaintiff and defendants as in the court below.

June 13, 1912, the plaintiff was a passenger on one of defendants cars which was proceeding north in wentworth avenue. Chicago. As the car was crossing 37th street it collided with a wagon loaded with lumber belonging to the defendant Rittenhouse & Imbree Co., which was going east in 37th street. The plaintiff was standing on the front platform of the car and claims that he was thrown with great force and violence against parts of the car and was thereby severely injured.

The defendants first contend that the verdict is against themselfest weight of the evidence; that the clear

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weight of the evidence shows that the collision of the car and wagen was so gradual that it created no disturbance of any consequence on the ear; that the plaintiff was not injured as he claimed; that this appears from plaintiff's conduct immediately fellowing the collisions in that he searched for his glasses in three different cars, went home without assistance, went to his shop for the seven days following, and did not call in a decior until July 18th; that plaintiff's actions were wholly inconsistent with his heving received any injury as claimed by him.

The evidence tends to show that the car in ones. tion was a large payeas-you-enter type; thet when it came in centact with the wagen one of the front whosis of the wagen were broken and the load of lumber slid or was thrown from the wagon; that the driver of the tens was thrown or fell from the wagon by reason of the jar: that some of the glass in the front of the car was chattered, and that part of the frame of our was bent or broken. The car was being operated by a student motorman, with the regular motorman standing at his side giving instructions. Some of the witnesses testified that there were about four persons on the front plufform, while others placed the number at from twelve to fifteen. The force with which the car struck the wagen was variously described by the witnesses as "terrific force." "great impact." "morely pushed" or "shoved" the wagen; "merely slid" against the wagen. A number of witnesses testified that immediately after the collecton they saw plaintiff searching for his lasses, and none of them saw anything that would indicate that he was injured. Plaintiff tentifloi that the car case in contact with the wagen with areat force: that he was violently shaken and thrown against the

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sior of the war that he felt managated and went into the cur, out down and held all wad in his hands for a few menter that he gave his name to the conductor; that he had a pain in the opine: that he told the conductor he was injured; that he pearded around in two or three ours for his glasson, looking for a new mee was said to lave found them: they he then went home, was around several days feeling week, and was complaining of his back; that in went to his place of equipment and did none work every day: that he west to the country for about a week; that on July lith he was confied to his bed and remained there for about air works outforing great pain; that he afterwerds was able to no shout on crutches which he was com-, elled to use for two or three months when he was able to walk with a cassi time but believed to be less call in his back since the addicent; and that prior to the accident he was in good health. The laintiff was still corrying a case at the time of the trial, which was more than two years after the agolerat. The family physician was first called about July 18th. He found the plaintiff in bed complaining of pain in one of his limbs and back, and the Maintair ind a sil of temperature. Laring the reminder of July the physician called two or three times a day and always found plaintiff compliming and suffering. There were no vanible acoke of injury on plaintain's body; his back appeared to be elightly reddened. The physician tretification that are a first diagnosed the trouble as scintical rhoundism; that there were no torn muncles or ruptured lignments, no bones broken; that he treated plaintiff the last time about Movember, 1911; time laintiff was also our ring from nouritie; that is all opinion, the conditions found upon exemination of the plaintiff might occur without any

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violence, but that the neuritic free which plaintiff was suffering, in his opinion, was caused by an injury. Several witnesses testified that prior to the accident plaintiff was a strong healthy mas; that after the accident they saw him using crutches, a wheel chair and a cane. The plaintiff was alout 62 years old at the time of the trial. Se are impressed by the fact that plaintiff appeared to be perfectly frank in his statements on the witness stand. His entire testiatory appears straightforward and candid, and we feel that the jury was warranted in accepting his version of the matter. We have surefully examined all of the evidence in the record, and cannot say that the versist is clearly and manifestly against the weight of the evidence.

executive. We have heretofore discussed the evidence as to the mature one extent of plaintiff's injuries. At the time of the accident he was about 60 years of age, was healthy and active; he was expaged in the business of stair building and had been in rush business for about 40 years and maintained a shop. The evid not tends to show that he was unable to attend to his business on account of his injuries, and was compelled to employ additional help. Following the accident he suffered great pain and continued to suffer more or less pain from the time of the accident until the date of the trial, and the jury might never resembly inferred that his injuries were permanent. In view of all the evidence in the case, we cannot say that the amount of the verdict is excessive.

The defendants next contend that the organized of counsel for plaintiff to the jury was improper. In his opening argument to the jury counsel for plaintiff said:

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*Of course. I cannot prove, and there is no evidence in here, of what he lost in his business, and I cannot give you that, for it would be improper.

Mr. Rosenthal: I object.

The Court: Objection sustained; if it is not here don't argue about it.

Mr. Manes: It is not here and I am not arguing about it.

The Court: Then don't argue, don't mention it."

And continuing, counsel argued that the jury had a right to assume that since the plaintiff was still suffering, more than two years after the accident, he would continue to suffer, and that while plaintiff testified that he hoped and believed he would ultimately recover, such statement by plaintiff was not final or conclusive, but that the jury had a right to take the evidence in the case into consideration in determining the question whether the plaintiff would ultimately recover. Counsel then stated: "But I don't believe he will recover." The court overruled an objection to this argument and said: "Counsel has a right to draw reasonable conclusions from the evidence: but the jury know what the evidence is." From the foregoing it appears that the court properly sustained an objection to the argument as to possible loss of plaintiff's business, and told counsel not to mention the subject. As to the expression of the belief of counsel that the plaintiff would altimately recover, there was no intimation that this was based on anything except the evidence in the case, and the error, if any, was barmless. State v. Bricker, 135 fa.343. Furthermore the only ill effect of argument touching plaintiff's loss of business or the improbability of his ultimate recover, would be to unduly increase the amount of

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the verdict. We have heretofore held that the verdict was not excessive and the defendants were, therefore, not harmed by these statements of counsel. Deal v. Heiligenstein, 244 111. 239.

In his elecing argument counsel for plaintiff
said: "Now there to seem excuse for the man they ran into
on the lumber wagen not being here, and we are not surprised
after hearing this evidence to know that he le where he is.

Mr. Howenthal: Just a moment-

Mr. Hance: You are not surprised at that informa-

Mr. Rosenthal: Just a momont-

Ar. Hence: The force of that collision under the evidence here would explain very likely why he is where he is.

Mr. Resenthal: That statement -- it can mean but one thing -- that the sun died as a result of the injury, and I object to it.

Mr. Hames: I didn't say anything of the kind.

The Court: Wait until the objection get into
the record.

Mr. Recenthal: That statement and the inference resulting therefrom not being based on the evidence in this case. I respectfully object to.

The Court: Objection sustained, and the jury will disreyard it."

The argument of cameel as above set forth was elearly improper, and the court promptly sustained an objection to it and told the jury to disregard it. The reliable of remnetances, we cannot say that the judgment should be

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Feversed. Gitt of Chicago v. Lesetch. 142 Ill. 642;

Jolist Mt. By. Cs. v. Call. 143 Ill. 177; Jonesouth Mining

& Mfs. Co. v. Erling. 148 Ill. 521; F. C. C. & Rt. L. Ry. Co.
v. Kinare, 263 Ill. 3881.

The defend ats next contend that the court committed reversible error in giving to the jury instruction So. 12 on behalf of plaintiff, and instruction So. 14 on behalf of the defendant Mittenhouse & Embree Co.

penderance of the evidence is not to be determined alone by the number of sitnesses testifying; that in setermining the question of the prependerance, the jury may take into consideration the number of sitnesses, their sensuet and demeaner while testifying, their apparent intelligence or lack of intelligence, their interest or lack of interest in the result of the suit, if any, their opportunities for knowing the matters about which they testify, "and from all these circumstances determine on which side the prependerance of the evidence lies."

Instruction No. 14 emmerated certain things that
the jury should take into consideration in determining upon
which side the prependerance or greater weight of the evidence lies and told the jury that they should consider these.
"in view of all the other evidence, facts and circumstances
proven on the trial."

The particular objection urged to instruction to. 12 is that it "cas misleading in that, while it advised the jury that in determining the propenserance of the evidence they signt take into consideration the number of

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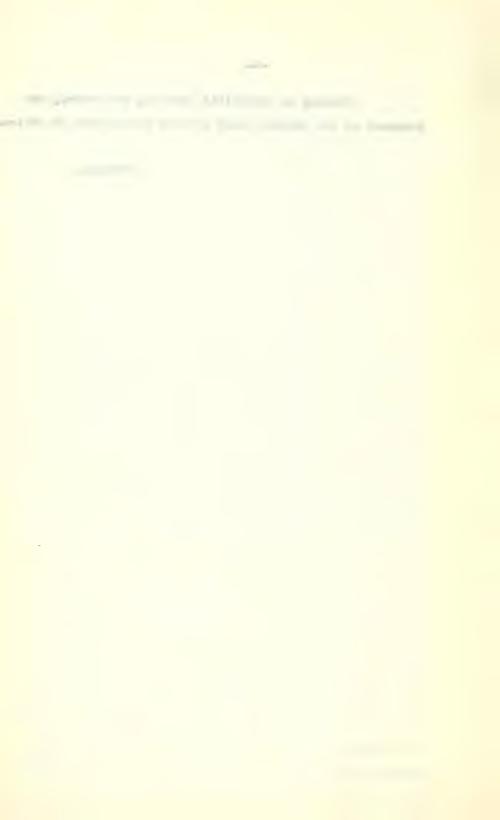
witnesses, they were not told that it was the number of vitnesses testifying in favor of either party as to a Berticular fact or atate of facts that might be considered." and that it limited the jury in determining the question of the proponderance of the evidence to a consideration only of the elements mentioned in the instruction. The objection urged to instruction We. 14 is that it does not contain "the apparent consistency, fairness and congruity of the evicence," and that it emitted the element of the number of witnesses. Instruction No. 12 is subject to the objection urged that it limited the jury in exterminism the question of the presenderance of the evidence to a consideretion of the elements summerated. The jury should have been left free to consider all the evidence and all the facts and circumstances in evidence in determining where the preparatrance or greater weight of the evidence lies. I. U. T. Do. v. Hanne, 228 Ill. 346; Bricoh v. Cal. City By. Co. 176 Ill. App. 341: Eyers v. Fuller Ic., 167 Ill. App. 49: Largen v. Ward-Corty Co., No. 20985, Appellate Court, First Dist. Instruction No. 14 is subject to the objection that the element of the number of witnesses see outlied. This element, however, counsel for the defendants concade was included in Instruction No. 12. By Instruction No. 14. the jury were told that in determining the question on which sice the preponderence of the evidence lies, they should take into consideration "all the other facts and circumstances proved on the trial, if any." we are, therefore, of the opinion that there two instructions, while not strictly accurate when read together, are not so misleading as to carrent a reversal of the judgment.

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Finding no reversible error in the record, the judgment of the Circuit Court of Cook County will be affirmed.

APVIII. W.



PROPLE OF THE STATE OF ILLINOIS.

Defendant in Error.

VS.

LOUIS ROSENBURG,

MUNICIPAL COURT

OF CHICAGO.

200 I.A. 13

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, Louis Resemberg, charged with the crime of obtaining money by false pretenses, was found guilty and sentenced to imprisonment and fined. By this writ of error he seeks to have the judgment of the court reversed.

It is argued that the information is wholly insufficient. Under the statute - chapter 38, sec. 408. Hurd's Ill. Stat. - the accusation will be sufficient if it states the offense in the language of the statute. "or so plainly that the nature of the offense may be easily understood by the jury." The information charges that the defendant on a certain day, in Chicago, "did with intent to cheat and defraud and to obtain money by false pretenses. did obtain from the affiant the sum of one hundred and fifty dollars (150) by falsely representing to this affiant that." - followed by averments in detail of a number of representations made by the defendent as to services performed by him and expenses incurred, and correlative averments denying that defendant had done each one of the things which he represented to have been done by him. The omission of the statutory word "designedly" is not fatal where the infor-

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mation avers with particularity representations of things done, with a negative averment as to their performance; the existence of such facts would be impossible without know-ledge and design on the part of the defendant; therefore knowledge and design will be implied.

The information was sworn to by Anna Myrtle Moss, and the averment that the money was obtained "from this affiant" is sufficient. It will be presumed that the money was in genuine money of the United states unless the information is challenged by motion to quash, which was not done in this case. This observation is also applicable to the objection that the information fails to specify the kind and value of money. We think it sufficiently appears that the person defrauded by the false representations was the person filing the information, and it also sufficiently appears that she relied upon the representations made to her. If the defendant made representations as to the things done by him, while the fact was that he did not do them, it would follow that he knew such representations were false. It will be presumed that the person filing the information owned the money which was obtained from her. None of these objections to the substance of the information, and as there was no motion to quash, the motion in arrest of judgment would not reach such defects in an information, for, as it was held in People v. Yeber, 152 Ill. App. 102, whatever is included in or is necessarily implied from an express allegation need not be otherwise averred. See Maynard v. People, 135 Ill. 416.

Other points are presented which go to the proceedings before the court. None of the evidence has been preserved by a bill of exceptions, and it does not appear from the record that all of the proceedin s in the trial

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court are before us. Under such circumstances it will be presumed that there were proceedings before the court sufficient to sustain the judgment. The record shows that the defendant signed a waiver of trial by jury, and it is claimed that subsequently there was an attempt to withdraw this which was denied by the court. However this may be, in the absence of a complete bill of exceptions showing all the proceedings before the trial court, every presumption will be in favor of the regularity of the proceedings.

Other suggestions are made but are not of sufficient importance to require that the judgment be reversed. It is therefore affirmed.

AFFIRMED.

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A CONTRACTOR OF THE PARTY OF TH

An information under sec. 403, chap. 33, Hurd's Ill. Stat. which emits the word esignedly" used in said section is not fatalla defective where the information ers with particularity representations of things done, with a negative averagnt to their performance: knowledge and design will be implied.

An information under sec. 403, chap. 33, Hurd's Ill. Stat., is sufficient which ers the money was obtained "from this affiart", or which fails to allege the new was genuine money of the United States, or the kind and value of money, or at the person defrauded was the person filing the information; or that he relied the information given him, or that the defendant knew the falsity of his reprentations as to things done by him which he had not done, or that the person ling the information owned the money obtained from him: and a notion in arrest judgment will not reach such defects in the absence of a motion to cuash.

Where none of the evidence is preserved by bill of exceptions, and the record ils to show all the proceedings in the trial court are before the appellate court, will be presumed there were proceedings before the lower court sufficient to stain the judgment, and every presumption will be in favor of the regularity of proceedings.

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tame of the evidence is consecred by bill of exactions, and the readshow all the removedings in the coin court and before the spreliste or ant, or consumed there send tracesticts before the lower accord sufficient to the interest, and every crosscation will be in favor of the resolution of THE UNITED STATES LITHOGRAPH CO.. corporation.

Plaintiff in Error.

VS.

AMERICAN IRONING MACHINE CO.. corporation. Defendant in Error. ERROR TO MUNICIPAL COURT OF CHICAGO.

7 - 6

MR. PRESIDING JUSTICE ECSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff by its statement of claim sought to recover a balance due for goods, weres and merchandise sold to defendant under a certain contract. Defendant by its affidavit of defense denies the making of the contract as alleged by plaintiff, alleges the making of another contract covering the same subject matter, in which plaintiff is in default and consequently indebted to defendant, for which it makes a claim of set-off for the amount of \$190.10. Upon trial by the court the issues were found for the defendant as to plaintiff's statement of claim and for the plaintiff as to defendant's set-off. laintiff by this writ of error brings in review the record and judgment of the court, and defendant has filed cross-errors pertinent to its claim of set-off.

There is no serious dispute as to the facts giving rise to the controversy. Ilaintiff is engaged in the lithograthing business at Marwood, unio; the defendant is located in Chicago. In the fall of 1913 Mr. F. L. Wilke, a Chicago salesman for the plaintiff, called several times upon the defendant and sellcited an order for a quantity of lithograph displays or, what are called in the trade, "cutouts." After negotiations defendant placed with r. milke an order written on one of the printed forms of the dee cerps earon, laintiff in irrar,

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fendant. This order was not accepted by plaintiff, which made out an order on one of its own printed blanks and through its salesman, Fr. wilke, this latter order was presented to defendant and signed by it. This order, which is quite long, containing a number of specifications and details, was for 2. (O cutouts at a price of 65 cents each, totaling 1,000, At the bottom of the order, which was printed in part and partly typewritten, was this clause: "subject to acceptance in City of Norwood, Ohio, by the United States Printing & Lighograph Co., sole sales agent." (The difference between this name and the name of the plaintiff is immaterial.) In reply to this order plaintiff sent to defendant a purported acceptance, which in several particulars was not in accord with the terms of the order. Immediately upon receipt of this defendant wrote to plaintiff noting the variances and asking plaintiff to acknowledge receipt of the letter, "as the order is somewhat at variance with your acknowledgment." To this plaintiff reglied, saying, "We did not reply to yours of January 3rd, having referred same to our Chicago office to take up with you." Subsequently ir. Wilke of the Chicago office of the plaintiff called upon defendant to settle the matters raised in the above correspondence. At this and a subsequent interview the defendant, acting through its president, .r. Grosse, and ar. Wilke, representing the plaintiff, entered into an oral contract as follows: The defendant agreed to purchase from plaintiff 1,000 cutouts, defendant to pay plaintiff \$900 therefor, the whole 1,000 cutouts to be billed and paid for immediately, the cutouts to be kept in storage by the plaintiff and shipped to the defendant in lots of about 250 at such times as the defendant should call for them. Subsequently bll of these cutouts were shipped to and

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accepted by the defendant, and a bill for 1,000 cutouts was rendered the defendant in harch, 1914, for -650, which was paid. Inder the oral contract for 1,000 cutouts 489 more were due to the defendant. Plaintiff did not ship this number but shipped 1,600 cutouts in a single shipment and insisted upon the defendant accepting the same. No opportunity was given defendant to accept the balance due on its contract for 1,000 cutouts, that is, 489. The defendant refused to accept this shipment from the railroad company.

Plaintiff claims the existence of a contract of purchase for 2,000 cutouts. Defendant maintains that the only contract made between the parties was the oral contract for 1,000 cutouts, and that as it has advanced payment for cutouts not delivered, it is entitled to recover on its set-off.

the plaintiff and the defendant did not amount to a centract.

Ilaintiff argues and predicates its claim upon the assumption that the writing dated December 19, 1913, which is the order for 2,000 cutouts, was the contract of the parties. This however is error, as it appears clearly from the language of this order that it was merely an offer made by the defendant, and in terms it is made subject to the acceptance in Forwood, Ohio, by the United States Frinting a Lithograph Co. Whether or not this order would be accepted was uncertain, and until it was definitely and without addification accepted it was not a valid contract. This would seem too clear to require argument. A case directly in point is Holder v. Aultman, 169

U. S. 81. The purported acceptance by the plaintiff in reply

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to this order varied from the terms of the offer, and therefore created no contract but amounted to a rejection and left the offer no longer open. In vol. 9 Cyc., p. 207, is a long list of decisions supporting the proposition that an acceptance to be effectual must be identical with the offer and unconditional. Where one offers to do a definite thing and another accepts it conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to negotiate further or it is a counter proposal, but in neither case is there a contract. This rule is supported by such an abundance of authority as to make further comment unnecessary. This is also the rule even if the differences may not be of great importance in the mind of one of the parties. The test as to the fact of a contract does not depend upon the greater or less degree of difference between the parties; the acceptance must be in the identical terms contained in the offer.

The situation, therefore, was, when it. Wilke called upon the defendant pursuant to instruction from the plaintiff's home office and its letter to defendant, that the matter was entirely open, and the parties through their representatives were competent to make such agreement or contract for the purchase of cutsuts as might be mutually agreeable. That the contract was then made between these parties for the purchase of 1,000 cutouts is not seriously disputed. By its letter of January 9, 1914, stating that the Chicago office would take up the matter with defendant, plaintiff is estopped to deny the authority of ar. Wilke of its Chicago office to make the contract. By this letter defendant is informed that the matter had been referred to the Chicago office for settlement. It cannot repudiate this

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"that if one party refers another to a third person for information, as authorized to act or answer for him, he will be bound by the actions and statements of the person so referred to." Plaintiff's argument as to the authority of Br. Wilke proceeds upon the assumption that on the date of the letter of January 9th there was a contract between the parties, and upon this assumption it argues that parol evidence cannot be permitted to very the terms of a written contract; but as we have above stated, at this time there was no centract between the parties, and hr. Wilke had authority to make such contract as might be agreed upon.

The court was asked to hold as a proposition of law, substantially, that when a principal permits a person to be appear to/his agent, either generally or for a perticular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the face of such appearances. This proposition correctly stated the law and should have been given by the court.

We hold that when plaintiff shipped 1,600 of these cutouts, insisting that the written documents were the real contract and that the purchase was for 2,000 cutouts, it repudiated the contract for 1,000 cutouts. Defendant, therefore, was entitled to treat the contract as breached and to sue for damages. Its contract was for 1,000 cutouts, for which it was to pay \$900. It received 511 of these, which the evidence shows were worth \$459.90. It has paid plaintiff .650, and is therefore entitled to recover the difference between these amounts, which is \$190.10. The judgment of the trial court was correct as to plaintiff's statement of claim,

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but a finding should have been made for defendant for the amount claimed in its set-off. The judgment of the trial court will be reversed and judgment will be entered in this court for the defendant against the plaintiff for \$190.10 with costs.

REVERSED AND JUDGEENT HERE.

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SALVATORE DE SALVO. Defendant in Error.

VU.

ARTHUR R. ANDERSON. Flaintiff in Error.

EMOR TO THE EURICIPAL COURT OF UNICAGO.

200 I.A. 29

MR. JUSTICE HOLDON DELIVERED THE OFICION OF THE COURT.

Viefendant and plaintiff entered into a contract for the sale by defendant to plaintiff of certain real estate designated as number 1117 rest Chio Street, Chicago. Ine consideration recited in the contract to be asid by plaintiff is 7,25.. The contract also recites that 1500 was paid as earnest money, and that on the passing of the conveyance and closing of the transaction the remaining sum due on the purchase price should be liquidated by the payment by plaintiff to defendant of 11,000 in money and the giving of a first mort age for .4, ... and a accond mort ege for 1.750, secured upon the premises sold. The contract and earnest money were to be held by Havigato Javings Lunk in escrow for the benefit of both parties to the contract. James R. Navigato, of the bank bearing his name, was the agent who negotiated the sele and procured the contract to be signed by the parties to it.

Plaintiff has failed to join in error or argue the cause.

on a trial before the court plaintiff had judgment for \$500, which defendant asks this Court to reverse.

Inintiff refused to carry out the contract and demanded the return of the earnest money on the contention that he had been induced to sign the contract to purchase the property by false and fraudulent representations made to him by

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James 1. Living and the defendant. The representations alloged to have been false concerned taxes for the year 1915, which plaintiff claims should have been proported from Japuary 1, 1915, to the date of the closing of the transaction, and which would assumt to about 350 in favor of plaintiff; and the further representation that there would be no extra charge for a mortgage of 35,750, whereas, it is claimed, an expense in this regard assuming to 1150 was to be made. The amount of 35,750 referred to in the statement of claim evidently covers the mortgages of 34,000 and 11,750 recited in the contract. See think the finding and jud ment are contrary to the evidence and the law applicable therete.

and had at the time of this transaction lived in this country ten years. He claims that he did not understand the inglish language. Mavinato, was procured plaintiff's signature to the contract, spoke the Italian language, and it is in evidence that at the time the contract was signed the parties present spoke in Italian and not in inglish. Paintiff paid the earnest money to havinate and not to defendant, and he paid it at the instance of havinate at the time he signed the contract.

Neither in the evidence nor in the statement of claim does it appear that any subterfage was reserted to to prevent plaintiff from fully understanding the terms of the contract which he signed. Defendant did not speak Italian at the signing of the contract and it not speak that he could speak that impuage. For is it claimed is the evidence that defendant made any representation to plaintiff which induces him to sign the centract nor any statement in relation to it or its terms contrary to such terms. For nowe

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it appear that plaintiff interrogated defendant regarding the terms of the contract. There is nothing in either the statement of claim or in the evidence in this record which justifies the inference that fraud or fraudulent conduct was resorted to by defendant or those representing him in the matter to induce plaintiff to execute the contract. Notither fraud in fact nor fraud in law is inferable from the proofs in the record.

The representations claimed to be fraudulent relate to the taxes and the expense of the two mortgages provided for in the contract; we regard them as being more in the nature of promises to be carried out in the future, than as representations of any existent fact. Luch representations, if mode, would not constitute fraud, even though plaintiff was induced to enter into the agreement relying upon such representations. Day v. investment Co., 153 Ill. 293.

It is not sufficient to allege fraud. Fraud must be proven like any other fact, and the act. or things done which in law constitute fraud must be proven by a preponderance of the evidence, the same as any other material fact in a suit at law. Ichennan v. Mickelberry, 242 :11.

Fraud is never presumed. When transactions may be fairly reconciled with honesty and when the weight of the evidence favors an honest motive, the conclusion of integrity should always be adopted. The contract here involved, in the light of the testimony expresses the monest intention of the parties and their agreement, and cannot therefore be said to be tainted with fraud.

we hold the plaintiff has neither stated nor proven a cause of action against defendant, and we there-

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fore reverse the judgment of the sunicipal Court and enter a judgment in this court of nil capiat and for costs against plaintiff.

REVERSED WITH JUDGELAT OF HIL CAPIAT.

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JOHN H. LAWRENCE and EDWARD P. LAWRENCE, doing business as LAWRENCE BEOTRERS.

Appellants.

VB.

WILLIAM WANDHAGEL and CHARLES E. F. WENDHAGEL, doing business as WENDHAGEL & COMPARY, Aupellegs.

AFFIAL PROM MUNICIPAL SOURT OF CHICAGO.

200 I.A. 32

BR. JUSTICE BOLDS DELIVARED THE CEITION OF THE COUNT.

This is an appeal from a judgment of nil capiet and for costs in a trial before the nunicipal court situout the intervention of a jury.

The facts involved are, that defendants had a contract with plaintiffs for certain structural steel work at sterling, in this State, under which plaintiffs sere authorized to retain out of any moneys que defendants at any time sufficient to indomnify plaintiff's against any claim or lien for maich they or their property might be liable, . n hovember 24, 1911, one David . "heefe threatench a buit at law against plaintiffs for personal injuries claimed to have seen suffered in and about the crection by defendants of the structural steel work for plaintiff's. Plaintiff's claimed the right to retain about 14,000 due defendants to a mit the result of G'Reefe's threatened suit. Befendants not only denied liability, but also the right of plaintiffs to retain the money then due them. The parties to this suit settled this controversy by defendants giving to plaintills a bond of indemnity in the panalty of \$4,000, conditioned that defeatants should hold plaintiffs naraless from any appinst all liability for personal injuries sustained by any and all per-

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sons as the result of the carelessness or negligence of defendants, their agents or employees, in and about the performance by defendants of their contract with plaintiffs, agreeing to pay plaintiffs "all damages resulting or arising from such negligence, which may hereafter be assessed against them in any action brought by any such person or persons, then this obligation to be void," etc. 6 Reefe, true to his tareat, suca plaintiffs in the Direct Court of shiteside county for damages for the personal injury waich he claimed he suffered wails engaged about the structural steel sork being erected by defendants under their contract with plaintiffs. . laintiffs defended the O'Reefe suit successfully and this suit is instituted in debt upon the incomnity bond hereinbefore referred to. in an effort to recover from defendants attorney's fees. witness fees, and other expenses paid by plaintiffs in their successful defense of the C'Acefe bult, with int rest upon all of such dispursements. The attorney of defendants assisted in the defense of the O'heefe suit by advising plaintiffs' attorney regarding the pleadings and, at one time, as to the advisability of procuring a centinuance, also as to the advisability of employing additional counsel to help in the triul of the case and the propriety of procuring medical testimony on the theory that a reefe was malingering. Defendants' attorney was also present at the trial, although he took no active part in it. He had what the English bar terms a "watching brief." It also appears that in a metion to instruct a verdict for plaintiffs in this suit, defendants in the C'Keefe suit, the name of defendants' sttorney was coupled with those of plaintiffs' attorneys. After the verdict of the jury in favor of plaintiffs was returned, de, with restrict the following section of the sectio

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fendants' lawyer wrote plaintiffs' atterney a letter of congratulation, expressing his wonder whether the versict was based on the legal question or on the fact that O'Keefe was "sheaming."

The contract between the parties and the bond of indemnity were two different transactions. Men the bond was given and accepted and the money due under the contract to defendants was paid to them, that contract and all its conditions were satisfied and the relations of the parties thereunder settled and ended. The right to retain the money due under the terms of the contract until the outcome of the C'Reefe threatened litigation, was waived and the bond of indemnity in suit substituted in its place. Thereefter the rights of the parties must be admeasured by the conditions of the bond.

Nothing can be read into the bond which does not actually appear in it or that is not warranted by legal interpretation of the language used to express the intention of the parties, which intention must be gathered from such language. If plaintiffs had desired to have the bond cover their costs and expenses in defending the O'Keefe or any other suit, and defendants had been willing to yield to such desire, a suitable covenant to that effect could have been inserted. Liability cannot be extended by construction. By the covenants of the bond the parties thereto are bound. Shether the canon of construction contended for by plaintiffs, - that the conditions of the bond be construed most favorably to plaintiffs because the bond was grawn by defendants and proffered by the to productiffs or the reasonable interpretation of the words found in the bond be indulged, the result will be the same.

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The covenant is limited to "all damages resulting or arising from such negligence which may hereafter be assessed against them in any action brought by any such person or persons." No damages have been assessed against plaintiffs; on the contrary, in the O'Keefe case the verdict and judgment exculpate them from damages. e do not find anything in the conduct of defendents that would warrant us in holding that they had put any other or different interpretation upon the conditions of the bond than the law would but for such conduct place thereon. It was to the interest of the defendants to do all legitimately in their power to defeat the ction of O'Reefe against plaintiffs, because if a judgment had gone against plaintiffs the defendants would have been liable under their bond to pay the assent of the bond within the limit of its penalty. To prevent O'Keefe from recovering a judgment against plaintiffs was the sole purpose of defendants' interest and efforts. By their joint efforts they succeeded. That success satisfies the condition of the bond and absolves defendants from all liability thereunder.

The action of the trial judge in refusing to hold as low applicable to the case the propositions of law tendered by plaintiffs was without error. The doctrine of estoppel was not invokable again t defendants. The contract, as heretofore stated, was out of the case. The obligations of the contract and bond were dissimilar. Each stood separate and apart from the other and subserved separate and distinct purposes.

There is no reversible error in this record, and the judgment of the Municipal Court is affirmed.

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337 - 21322.

ARMIN W. BRAND et al., Appellants.

VS.

JOHN H. F. RUETER et al., Appellees. APPEAL PRON
CIRCUIT COURT.
COOK COUNTY.

200 I.A. 42

MR. PRESIDING JUSTICE BATHEL DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree dismissing for want of equity an amended bill of complaint filed in a suit to foreclose a trust deed executed by Rueter and his wife.

Winnie, to secure his four notes dated Sept. 1, 1892, one for \$5000 and three for \$1000 each.

The principal questions presented are, was the suit barred by the statute of limitations, and was the transaction usurious? The decree appears to have been entered on an affirmative answer to one or both questions, whereas we think both should be answered in the negative.

In our opinion the amended bill, filed Dec.

24, 1913, does not state a different cause of action
from that stated in the original bill, filed Jan. 3,

1913. If, therefore, the final payment of interest was
made Feb. 6, 1903, the suit was brought within the
statutory period of ten years.

By extension the notes matured Sept. 1, 1900.

The semi-annual interest of \$280 was paid regularly up to dept. 1, 1899. On warch 1, 1900, 180 was paid and credited.

On Web. 2, 1902, \$8000 was paid and applied first, to liquidate the accrued interest on all the notes to that date, next, to the payment of the note for \$5000 and

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one note for \$1000, and then to the reduction of the other two notes to \$635 each. Such application was proper, especially in the absence of any direction by the debtor.

(Monzon v. Heyer, 190 III. 105.)

Being importuned for interest in the fall of 1962. Rueter in becember or January following gave the agent of appellant, Armin W. Brand, holder of the notes, a note for \$50 of a third person payable to the order of, and endorsed by, Rueter, which was collected on Reb. 6.

1963, and credited of that date, of which Rueter was notified. The record discloses no agreement to accept the note as payment of any part of the debt, and no circumstances that raise a presumption that it was so taken. It would therefore be decaded conditional payment only, (cheltennic tens a first Co. v. Cates Iron orks, 124 io. 653) and as of the date when it was collected. On the date of filing the original bill, therefore, the statute had not run.

Rueter berrowed the money to improve one of the lots conveyed by the trust deed. He applied to one Elumenthal, a morthage broker, for the loan, and agreed to pay him a commission of 2½% and the expenses connected therewith such as examining abstract, recording, etc. The latter submitted it to one Fichael Braid, who looked over the property, accepted the necurity, and gave blumenthal his check for the amount of the loan, \$8000. Blumenthal deducted therefrom \$200 for his commission and paid out the balance to Rueter's centractor on Rueter's orders, kneter requested Blumenthal to get an extension of time as aforcanid on the notes, which was done and for which he paid Blumenthal moother commission of \$200. Bo part of either commission was received by the lender, Brand. During the year 1892.

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owned them. They became the property of appellant,

Armin 7. Brand, in 1899, after which the payments thereon

were made to the latter's agent. Neither the lender nor

subsequent owners of the notes received or agreed to receive

more than the legal rate of interest thereon. The com
pensation paid to Blumenthal for negotiating the loan and

procuring an extension of the time of payment, was according

to contract between him and the borrower, with which the

lender had no connection and of which he had no knowledge.

The essential facts of this case are not different from

those in the case of Moyt et al. v. Pawtucket Institution

for eavings et al., 110 id. 390, which were held not to

constitute a usurious transaction. (See also, Gantzer v.

Schmeltz, 206 id. 560; anford v. Kane, 133 id. 199.)

Evidence was received tending to show that Blumehthel had not taken out a license as required by the ordinances of the Sity of Chicago, which might be relevant if Blumenthal was suing for his commissions, but which is not relevant to the issues here.

There was also evidence that the notes were signed sept. 3, 1892 and dated sept. 1, 1893 and that the original loan was not paid over to Blumenthal until Nov. 10, 1892, but that the interest was paid thereon from the date of the note. The record does not disclose whether the lender held the money for Ructer's use from the date of the note. The grangement between him and the lender in that respect was not shown. Brand agreed to make the loan b fore ept. 1st. If he held the money for Ructer's use from that date the transaction was not tainted with usury by paying interest from that time. The burden of proving usury was on the debtor, and was not established. (Cobe v. Guyer.

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237 id. 516.) Besides the interest, if usurious was paid before maturity and before the transfer of the notes to the present belder. (Culver v. Csborne, 231 id. 104.)

The decree will be reversed, and the cause is remanded for entry of a decree on the amended bill in harmony herewith.

REVERSED AND HEMANDED.

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JAMES J. RYAN. Appellee.

VB.

CHICAGO FOUNDRY COMPANY, a corporation, Appellant.

APPEAL PROM
COUNTY COURT,
COOK COUNTY.

200 I.A. 45

MR. PRESIDING JUSTICE BANKS DELIVE AND THE OPINIO OF THE COURT.

This was a suit in <u>assumpsit</u>, brought in the County Court, and based upon an award made for appelled against appellant under the Workman's Compensation act of 1911, which was signed by only two of the three arbitrators appointed thereunder.

Invoking the common law rule, appellant urges that the award was void because not signed by the three arbitrators. Section 10 of said act contemplates joint ction by a board of arbitrators appointed thereunder; and it is provided in paragraph 9, section 1 of chapter 131 R.S., relating to the construction of statutes, that

"Words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons."

Construing the Compensation Act with the aid of this section, we think the award was authorized.

It is also contended that the case does not come within the class of cases of which the county court has jurisdiction. As that court has jurisdiction in all actions where assumpsit will lie and the damages do not

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..... y.... p.k. -9i. - The rate of a ratio off while we one: exceed \$1000 (Sec. 7 County Court Act, Ch. 37 R. S.; and Par. 6, Art. 2, Ch. 79 R. S.) and as assumpsit is a proper remedy on an award (McDonald v. Bond, 195 Ill. 192,) and the award declared on was for less than \$1000, and the judgment for 301.25 does not exceed the amount of the award, the point is not well taken.

the court properly excluded offers of evidence bearing on the question of whether the defendant company was liable under the Workmen's Compensation Act, as it was not relevant to the issue presented by the declaration.

The judgment will be affirmed.

AFFIRMED.

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THE PEOPLE OF THE STATE OF ILLINOIS.

Defendant in Error.

VS.

ABRAHAM CLICK.
Plaintiff in Error.

CRIMINAL COURT,

200 I.A. 46

MR. PRESIDING JULTICE BARNES DILIVIAND THE COURT.

plaintiff in error was indicted for larceny and receiving stolen property, the value of which exceeded fifteen dollars. He pleaded not guilty and the case proceeded to trial. There appearing to be a variance, the state's attorney asked for a continuance and the defendant for his discharge. The court suggested a plea to a misdemeaner if the defendant was "willing to take a chance to take a year in the House of Correction." at the conclusion of some discussion between the judge and the counsel, the attorney for defendent remarked, "I think the best thing, your Monor, will be to withdraw the jury." Thereupon without further remarks the court said: "On motion of the defendant, the jury withdrawn and the defendant's plea of not guilty withdrawn and the defendant's plea of guilty entered, and the defendant warned and sentenced to the House of Correction for one year and fined one hundred dollars and costs."

No explanation of the consequences of the plea of guilty (if we assume one was properly entered) was made by the court, and no witness was examined as to the aggravation or mitigation of the offense. The statute required both.

(Sec. 4, Div. 13, Criminal Code, Krolage v. People, 324 Ill.

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456.) If we may assume from the bill of exceptions that the calling of witnesses was waived, and that defendant acquiesced in the entry of a plea of guilty and a sentence to a year's imprisonment, still we can not regard the court's remarks above quoted as a compliance with section 4, Div. 13 of the Criminal Code requiring that the plea of guilty "shall not be entered until the court shall have fully explained to the accused the consequences of his plea." especially when the punishment imposed exceeded that which the court intimated might be given. The court at one point of the discussion referred to the "maximum" penalty, but does not appear to have explained to the accused what it was. The proceeding was too loose to be countenanced as a compliance with the statute or a precedent in a case where one is deprived of his liberty. Therecord as made by the clerk shows a compliance with the statute, but it will not prevail as against what is shown in opposition to it in the bill of exceptions. (I. D. & W. Ry. Co. v. Hendriam, 198 id. 501; McChesney v. People, 174 id. 46.)

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

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. CENTRAGE CES E BELTER

OLD ROSE DISTILLING COMPANY, a corporation, Defendant in Error,

MUNICIPAL COURT
OF CHICAGO.

ELIZABETH PARKHILL

Plaintiff in prror.

00 I.A. 48

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

Defendant in error (plaintiff below), brought an action of forcible entry and detainer against plaintiff in error (defendant below), for the possession of certain premises; plaintiff's right of possession being based upon a lease entered into with one McGivern, the owner thereof. The court having found the issues for the plaintiff, and having entered judgment thereon, defendant brings error.

This suit is the aftermath of a similar proceeding for the possession of the same premises, brought by the said McGivern against the defendant, wherein the court also found against the defendant, which judgment was later affirmed by this court upon a writ of error. McGivern v. Elizabeth Parkhill, Ill. App., Gen. No. 20826.

It is urged that during the pendency of the writ of error in McGivern v. Parkhill, supra, the present action should have been abated. VIt is a sufficient answer thereto to say that this question should have been raised in the court below, and comes too late when raised here for the first time. (Hailman v. Buckmaster, 8 Ill. 498). Furthermore, the pendency of a writ of error cannot be invoked to abate another similar action unless the former operates as

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a supersedens. (McJilton v. Love, 13 III. 486). A supersedens having been denied in McGivern v. Parkhill, supra, defendant's contention that the present suit should have been abated is without merit.

In the present action H. J. Parkhill, the husband of the defendent, was originally the sole defendant. Subsequently his wife, the defendant herein, was made a joint defendant. Later, however, H. J. Parkhill was discussed, and the case preceded against the defendant alone. It is urged that this substitution of parties defendant constituted a new cause of setion. Such, however, is not the law.

Hetropolitan Ins. Co. v. People, 209 Ill. 42; Thomas v. Fame Ins. Co., 108 Ill. 91.

Defendent has also raised other points, which were adjudicated in <u>McGivern</u> v. <u>Parkhill</u>, <u>supro</u>, and hence they will not be considered here.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

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MARY HOEFT.

Defendant in Error,

JOHN HOEFT. Plaintiff in Error.

ERROR TO

CIRCUIT COURT.

COOK COUNTY.

200 I.A. 49

MR. JU TICE MCDONALD DELIVERED THE OPINION OF THE COURT.

On July 15, 1911, defendant in error (complainant below), was granted a default decree of divorce, on the ground of desertion. On the day the said decree was entered, plaintiff in error (defendant below), presented a motion to set aside the decree, and for leave to file his answer, which said motion was entered of record and continued. On March 4, 1912 defendant presented his sworn answer to the bill and an affidavit in support of said motion. The court overruled said motion, and to review this action of the court, this writ of error has been prosecuted.

It is contended by the defendant that the court. in overruling said motion, abused its discretion. Underlying this contention is the claim of the defendant that his affidavit and sworn answer set forth a meritorious defense to complainant's bill. e cannot agree with this contention.

The answer filed by defendant denied the wilful desertion and its continuance without reasonable cause, as set forth in the bill. - aid answer admits, however, that the defendant had been living separate and apart from the complainant from the date of desertion alleged in the bill

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(November 4, 1907) to March 4, 1912, the date the affidavit and answer were presented to the court and the motion denied. Defendant, in his answer, seeks to justify his long absence from his wife, on the ground that she had caused his arrest on a charge of disorderly conduct: that when that suit was nolle prossed, the justice of the peace before whom it was pending, warned him (defendant) that complainant wanted him to stay sway from her. . uch action on the part of the said justice of the peace, not shown to have been concurred in by defendant's the complainant affords no justification for/continued absence. Defendant's answer further alleged that prior to the desertion in question complainant's adult sons had threatened to take his life if he did not leave the home of complainant, after which he did leave and stayed away for seme time, believing that said threats would be carried out: that complainant knew of said threats, and consequently had her two sons arrested; that following his arrest of November 4. 1907 he fared a renewal of hostilities on the part of complainant's said adult sons; that because of the fear of these sons and the warning of the court, he stayed away. Vouch conduct on the part of her children can not be attributed to the complainant unless it be shown that she aided and abetted therein. The answer itself indicates that such was not the case, for it alleges that complainant had caused the arrest of her two sons because of these threats made against defendant.

From a careful examination of the record, we are unable to say that the court abused its discretion in over-ruling defendant's motion to vacate the lecree, and for leave to file the answer in question. Accordingly the decree will be affirmed.

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385 - 21372

EDWIN J. BOWES, Jr., et al., Appellants,

VS .

Appellee:

CIRCUIT COURT.

COCK COUNTY.

2 0 0 I.A. 5 1

THE JUSTICE MCDONALD LIVE OLD THE OPINION OF THE COURT.

Appellants A complainants below, filed a bill to restrain appeliee, Rugene . Pike Lone of the defendants belowf, from entering judgment upon a note for 21, 250, dated February 1, 1908, due six months after date, with interest at the rate of 6% per annum from date. By stipulation, defendant, Fike, whom we shall hereinafter designate as the -ros: -complainant; was permitted to file a cross-bill in said cause, wherein he prayed that a decree be rendered in his favor for the amount due him on the note in question. Allegretti Tthe other defendant below), was dismissed from the suit by consent of the parties. Upon a hearing of the cause thus consolidated, the chancellor found the issues for the cross-complainant, and entered a decree in his favor for the sum of 1.776, being the amount then due on said note, and dismissed complainants' bill for want of equity. From this decree, complainants appeal.

By virtue of a lease dated January 29, 1907, between the cross-complainant and Allegretti, the latter had a ten-year leasehold on certain premises therein mentioned. lecated in the lity of Chicago. About the time of the execution of said lease, Allegretti organized a corporation bearing his name, to which he forthwith assigned the lease

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in question. By an arrangement with 'llegretti, the complainants subsequently became stockholders of the Allegretti company.

The note in question was signed by complainants and Allegretti, as makers, and was given for accrued rent which the company owed the cross-complainant under the lease hereinabove mentioned. Frior to the maturity of said note, the complainants transferred their stock in said company to Allegretti, whe, in consideration therefor, agreed, inter alia, to indemnify and save harmless said complainants from liability on said note.

appelbants centend that the cross-complainant was fully informed of the last above-mentioned agreement and assented thereto; that when the note in question matured or august 1, 1908, cross-complainant and illegratti, without the knowledge or consent of the appellants, entered into a binding agreement, extending the time of payment thereof for the period of one year from said date, by reason whered the said appellants were released from liability. The chancellor found that the appellants had fuiled to establish, by a preponderance of the evilence, that a binding extension agreement had been entered into, and it is urged by the appellants that such finding is clearly and manifestly against the weight of the evidence.

on bohalf of the appallants, allegretti testified, by way of a deposition, that when the note in question become due, he had a talk with cross-complainant, in which he maked for an extension of time on said note for one year, and that the cross-complainant granted the extension; that he (Allegretti) agreed to keep this money and pay interest thereon, for one year; that cross-complainant did not make any demand for payment of this note before the and of the

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year; that just before August 1, 1969 he received a letter from cross-complainent, relative to the payment of this note on august first, to which he replied in substance, that he had received cross-complainant's latter; that it would be impossible for him to comply with his wishes regarding the note, but that he would bring in as much so he could by the first of august. He further testified that the time of payment of this note was subsequently extended from time to time; that he paid the interest on said note after the first year's extension, as agreed; all of which was without the knowledge or consent of the appealance.

Edwin J. Sover, another situess on behalf of the appellants, whose testimony was also submitted by way of a deposition, corresponded Allogratti in that he had had no knowledge of the extension agreement between cross-complainant and Allogratii on the \$1,250 note. He testified further, that the first information he had that the note had not been paid by allogratic, come from his bestless, about four years after its maturity, when the cross-complainant demanded payment thereof and threatened suit; that allogratii was in a position to pay this note at maturity, but that since then he had become a bankrupt.

the appellants, testified that he had no knewledge until

June, 1911, that the note in question had not been paid; that

prior thereto he had had no communication with cross
complainant, with reference to the unpaid note, nor had he

any intimation that the time of payment thereof had been

extended.

that he had a conversation with Allegretti at the time the note in question matured, but denied having granted him an

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testified that when the note fell due, appellants requested him to extend the payment thereof. He further denied having received interest for the period for which appellants claim the note was extended, and denied all knowledge of the fact that appellants had no further interest in the business, or that one Connell had intended becoming interested therein.

The witness C. W. Greenfield, was attorney for Allegretti in most of his dealings with cross-complainant coult lactered & and the appeliants, and his testimony was principally with reference to what transpired at these conferences. Regarding the agreement of May 15, 1908, wherein Allegretti agreed to courte la marchi hold the appellants harmless from any liability, he testified as follows: "Mr. Allegretti and Mr. Pike came to my office one day, and Mr. Allegretti said that Mr. Pike had come up with him to talk to me about the - well, as they expressed it. about getting the Bowes out of this business. Mr. Pike said that he would like very much to see the Bowes out of that business: * * * that he would do all he could to aid Mr. Allegretti in making a success of the business, and that he would do absolutely nothing further unless the Bowes were out of the business." This is in direct contradiction of cross-complainant's testimony upon this point.

It further appears from the evidence, that on July 31, 1908 the cross-complainant entered into an agreement whereby the rent was to be reduced, commencing July 1, 1908, and continuing until June 30, 1910, provided one James Connell would invest not less than \$10,000 cash in the company. The necessary cash was invested by onnell, and the rent was accordingly reduced. Conferences were had at this time, and as the note in question was about to

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extension must have been discussed and some arrangement made with reference thereto. It is significant that cross-complainant, from august 1, 1908, when the note in question matured, until just before august 1, 1909, did not make any demand for payment of this note. It is also a significant fact that cross-complainant never took up with the appellants the question of payment of this note until allegratic had become insolvent in June, 1912. The testimony herein above set forth, viewed in the light of other facts and circumstances shown by the record in this case, which we deem it unnecessary to set forth here, leads this court to the conclusion that the chancellor's finding is manifestly against the preponderance of the evidence.

that the cross-complainant had knowledge of the agreement made by allegretti to save appellants harmless from liability on said note, and that he (the cross-complainant) acquiesced therein, and it further appearing that said cross-complainant entered into a binding contract with allegretti, extending the time of payment on said note, for one year, it follows as a matter of law, that the appellants were released from further liability. Crossman v. ohlleben, 90 Ill. 537.

For the reasons hereinabove assigned, the decree of the Circuit Court of Cook County will be reversed and the cause remanded, with directions to enter a decree in conformity with the prayer of complainants' bill of complaint.

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HARRIETTE A. INGRAHAM, HENRY V. FREEMAN and JOHN F. GILCHRIST, Executors and Trustees under the will of GRANVILLE S. INGRAHAM, deceased,

Appellees,

VS.

JOHN V. MARINER and LUCINDA W. MARINER, Executors of the Estate of EPHRAIN MARINER, deceased, and J. PLATT UNDERWOOD, Appellants. APPEAL FROM
CIRCUIT COURT,
COCK COUNTY.

200 TH 53

MR. JU TICE MCDONALD DELIVERED THE OPINION OF THE COURT.

The decree herein appealed from stated an account between the parties hereto, and made final disposition of the assets of their joint venture. As this case has been reviewed on several previous occasions, it is unnecessary to here reiterate the facts. They are sufficiently set forth in the following former opinions in the case: Ingraham v. Mariner, 194 Ill. 269; Mariner v. Ingraham, 127 Ill. App. 542; id. 127 Ill. App. 550; id. 230 Ill. 130; id. 255 Ill.

It is contended by appellants, that under the contract of January 2, 1889, upon a sale of the property, interest on the \$70,000 invested by Ingraham in the joint enterprise should be included only for the purpose of determining the profits accruing therefrom, but that in the event of a loss, this interest item should be excluded; that as the decree of the chancellor includes said interest item in determining the amount of the loss, it is erroneous in this respect.

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The agreement of January 2, 1889 provides, in part as follows:

"The said A. J. Cooper, of the 2nd part, being desirous of taking an interest in said land, agrees to make a loan of \$30,000 (Thirty Thousand Dollars) at his own expense; also agrees to pay interest on said loan, and 6% on balance of Capital Stock to the said Granville . Ingraham; the 6% on the balance is not required to be paid until the sale of said land; then that amount to be added to the Capital Stock.

"The said Ingraham of the 1st part agrees to give to said Cooper of the 2nd part, half of the profits, after adding all expenses and interest to the \$1,000 (one thousand dollars) per acre of said land."

The aforesaid contention of appellants is based upon the language of the contract hereinabove quoted, viewed in the light of the foregoing decisions in the case.

Losses are the antithesis of profits, and both are determined in the same manner, unless otherwise provided by the contract. The language of the contract hereinabove cuoted expressly provides that the interest item in question shall be included for the purpose of determining profits; therefore, in the absence of any special provision for the determination of losses, it must follow that this same basis of computation was intended to apply to the losses as well, should there be any. To hold otherwise would lead to confusion. For instance, let us assume that upon the basis of computation contained in the contract, a loss of 1000 would result. If the position of appellants were tenuble, the interest item of approximately 382,000 would have to be eliminated. ith this item excluded the transaction would show a profit of about \$81,000. Clearly, such construction is illogical and gives rise to inconsistencies; and as we find nothing in the contract itself which would lend substance to the contention of the appellants on this point, the conclusion is inevitable that their position in untenable.

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is maintained by appellants that when our Supreme Court passed upon this case in 194 Ill. supra and 230 Ill. supra, construing the contract, only profits were anticipated. But it expressly held in the 230th Ill. that in case of a loss, it should be borne pro rata, according to the amount contributed by each. The decree upon which the court in the 230th Ill. was passing, used the following language:

"In case there should be no profits realized out of said enterprise, and in case there should not be sufficient to repay the capital, interest and expenditures aforesaid to the respective parties as herein announced, that each of the parties shall bear his pro rata share of losses incurred, according to the contribution made by each."

Nowhere has the Supreme Court indicated that in case of a loss the interest item in question should be excluded, although the foregoing banguage in the decree makes provision for the apportionment of losses, in the event there should be any. In the 255th Ill., our Supreme Court, after reaffirming its language in the 230th Ill., makes use of the following language. p. 111: "After the sale it was ascertained that there were no profits to be divided, but, instead, a loss of about \$168,000." This amount (\$168,000) includes the interest item in question, and while the foregoing language may be regarded as dictum, this precise question not having been before the court, nevertheless it indicates that the view of the Supreme Court at that time was that on the statement of an account between the parties the interest item should be included in determining the losses, and we do not feel warranted in holding contrary to this intimation especially as it is not inconsistent with anything the court has heretofore said in the case.

It is urged, by way of cross-error, that interest, from the date of sale, should have been allowed u on the principal amount of \$48,971.09 found due from appellants to

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passed when this ease is 124 lil. Surve and 250 lil. Frame,
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appellees. The contention of appellees is predicated upon sec. 2 ch. 74, R. .., which provides that "creditors shall be allowed to r ceive at the rate of 5% per annum for all moneys after they become due on any bond, bill, promissory note or other instrument of writing." VIt will be seen that, in order to come within the foregoing provision of the statute, the relationship of debtor and creditor must exist. The \$48, 971.09 found by the court to be due from appeliants to appellees, was, in fect, due from appellants to the firm, and from the firm to appelless, but, to use the language in appellees: brief, "as the same amount was due from the partnership to the Ingraham estate, and as there were no partnership assets remaining after the sale of the land, the decree ordered appellants to pay this sum direct to the Ingraham estate. In Lindley on Fartnership, 5th edition, it is said, p. 402: "If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss and make it up by contributions inter se. If the assets are more than sufficient to pay the debts and liabilities of the partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss, to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners instead of to a stranger." Clearly, therefore, the amount which appellants were decreed to pay to appellees, was a firm obligation, and consequently the relationship of debtor and credit never existed between appellants and appelless. We are of the opinion that the chancellor properly refused to allow the statutory by.

Finding no reversible error, the decree of the Dirouit Court of Cook County will be affirmed.

comp bedantitor were especially and appropriate the profile and appropriate the contract of th sec. 2 ch. 76, A. ... , which provides that foresties while the mar me are mad be no other coll so overe a of howells of The street from the open to one of the street street street the street that note or other instaures of writing. " An while he com their, in order to come within the foresting provinted of the cheinks, .takwa Jawa manibara bas madaab Ta gistameliasist sili \$42, 971.00 found by the court on he can tree as timesto we ું મુખ્યાં. અનેક • છે કે કે કે મામલે તેમણું આપણે અપાક તેમણે કે કરતે કુચલા **, સસ્કર્યો ઉલ્લે** from the firm to appeallers, but, to use the language in -toron of each porty and der persons while but " . Total fussible de with as the ingresimal estrate, not there were no particular scoots remaining of he cale of the land, the tener or ere. .. Plater ender mi had by formic and aldd yest of marleyge in Linking on serthorehig, this coid, e. s.: bus with both yeq or decidition for ear edges out 12" off there seem eranged bet programmer or maidalinail difference as a loss and asks is up by contributional fater ps. har aldah sad yang an dunang rism made erem and manar adal li in a constant and a constant of the constant o CONTRACTOR OF CONTRACTOR CONTRACTOR AND ADDRESS OF THE CONTRACTOR to a continue of the same and sector is construct and . There is a loss of the wife with the of as loss as because oner the carees orgen to be continued at the second and the same ែក ក្រាប់ ហេដ : ១៤ ៤០ ១៤៩ ខែជា និងបាននិងបាញ ១៩៤ ខែ១ ១៩ ១១៩៩ ស្រាញ វានៅ per to the first that you have not present and present and present to pay to appelless, as a tirm of the forther, car correquestly ar success for each to the dienote four mesoles in additionistic of appallents and appointed on the sure of the opinion that changeltor properly refused to which the assence;

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MR. JUSTICE MCGOORTY DISSENTING.

I dissent from that part of the foregoing opinion which holds that under the contract in question, interest on the \$70,000 (Ingraham's contribution to the venture) should be included in determining the losses thereof.

Under the decisions of the Supreme Court in this case, it is res judicata (1) that the contract imposed no personal liability upon Cooper to pay interest upon Ingraham's contribution to capital; (2) that the contract provided that before there should be any division of profits, Ingraham should receive out of the proceeds of the sale of the property, interest upon his contribution, such interest for that purpose to be regarded as additional capital; (3) that losses should be borne in proportion to contributions; and (4) that for the purpose of apportioning losses the contributions were \$70,000 by Ingraham, and \$30,000 by Cooper.

The Supreme Court in Ingraham v. Mariner, 194 111.

269, held that "If * * * the capital of the joint enterprise is to be deducted in order to reach a remainder which shall constitute profits, then the six percent interest on the \$70,000.00 is to be deducted, as well as the principal sum of \$70,000." In distributing the property of a dissolved partnership among partners, capital does not bear interest * * in the absence of express agreement or a usage of the firm to allow it. 2 Bates Fartnership, Sec. 781.

while the contract expressly provides that such interest shall be included for the purpose of determining profits, it contains no provision for the determination of losses, and to hold in the absence of such provision, as

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does the majority opinion of this court, "that this same basis of computation was intended to apply to losses" appears illogical. The supreme Court in the 194 111, 269, page 276, in denying appellee's contention that by the terms of the contract Cooper agreed to pay Ingraham the interest on the \$70,000 from his own share of the profits, when the land was sold, apparently interpreted the contract, not as entitling ingraham to interest absolutely, but only conditionally, viz, in case the land sold for enough to pay the same after paying the expenses incurred by the parties in conducting the enterprise. It therefore follows, in my opinion, that defendants cannot be required to pay out of their own funds the whole or any part of the interest upon the Ingraham contribution of 470,000. It seems evident that the sole purpose of inserting in the contract the provision for the payment of interest to Ingraham on his contribution to capital, and payment by Cooper on the 350,000 loan, was to secure to Ingraham a fair rate of interest upon the money he had setually invested in the enterprise before there should be any division of the proceeds of sale, as profits.

As I interpret the decisions of the Supreme Court in this case, it was been held that for the purpose of ascertainment and division of profits, ingraham's capital should be computed at \$70,000 plus interest thereon, and for the purpose of ascertaining and apportioning losses, at \$70,000 without interest. I am, therefore, of opinion that the decree of the Circuit Court should be reversed and the cause remanded to that court with directions to state the account in accordance with the account stated by appellants in their third assignment of error.

ises the majority spinion of left sense, school the gard was beaution of glogs of penalty as unlasted of sister pened illusting of the contract the charles and conjugate announced page 275, in decytary recelled and continue view by the one armages they be orange through a same or in the content intropy our to produce the subject the plant of any series, the same of the sa vilt det jo lode kolde androied of numerous gabistion was dust conditionally, but, he case the lead to the file of องไม่ กร้างสายคลาม สายสองการ อะไป ผูบปฏิบัญ ของกิร สายคลามสายผู้การของ partice in controllar the saferester. It therefore Falas is agaings of common asymbolical indicates you at , another ped the orang man as affords and already man alone to due que COLUMN TO SECURE AND ADDRESS OF THE PARTY ADDRESS O and al gariffered to sancture of the Last Looking of the outrees the propiet the level percent and the reading is reason on his control-tion to empired, one person by Corper on the southern Foun, west to thirefine a fair take of anyonesh group eas agency as had acted to ≈1.19 gar ad bisara eras. A eraind psityrasaa edi mi be≀ee⊽ selfano es , sies he sheepeng ons to sole

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J. E. McCOY, J. R. JOHNSTON and J. G. HOWELL,
Appellees.

ve.

ACME AUTOMATIC PRINTING CO., (corp.),

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

200 I.A. 55

MR. JU. TICE MCDONALD DELIVERED THE OPINION OF THE COURT.

This is a motion, by appellees, to dismiss the appeal. An inspection of the record filed herein discloses the fact that at the time this appeal was taken, there was then pending before the trial court a motion to vacate the judgment from which this appeal was prosecuted. Hence, the judgment was not final, and the appeal was prematurely taken. Hosking v. So. Pacific Co., 243 Ill. 320.

APPEAL DISMISSED.

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THE PROPLE OF THE STATE OF ILLINOIS, Defendant in Error,

VS.

MILTON M. GREEN, Plaintiff in Error. MRROR TO
MUNICIPAL COURT
OF CHICAGO.

200 I.A. 59

WR. JULTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiff in error (defendent below), was found guilty of the offense of living in an open state of adultery and fornication with one Mary Williams, and was sentenced to pay a fine of \$200 and costs. To reverse this judgment, this writ of error is prosecuted.

Defendant contends that the information upon which this procedution is based is repugnant in that the defendant is charged therein with having committed the offense of adultery and fornication with one "Mary Doe whose name to this affiant is unknown." Obviously, the name "Mary Doe" was intended as purely fictional, and such being the case, the use thereof is not inconsistent with the words following it, "whose name to this affiant is unknown."

It is further maintained by defendant, that the informant knew the correct name of "Mary Doe" at the time he signed the information. From a careful examination of the record, we can not say that the informant was possessed of this information.

Defendant next contends that the verification of the information is fatally defective. The point raised by defendant is, that the words, "sworn to" are improper in an

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Plaintiff in Trear.

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tery and fermication with and "Mary has whose mane to its effications." Govinadly, the mare "Fury has" intended an purely fictional, and anch being the ones, use thereof is not inconstatent with the words following, "whose news to this offices is unknown."

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affirmation, "affirmed to" being the correct form. This, however, is a matter of form only, and should have been raised specifically in the court below; it comes too late when raised here for the first time.

the status of Mary williams. The information charge the defendant and "Mary Doe" with living together in an open state of adultery and fermication. There was competent evidence to show that the defendant was, at the time the alleged offense was committed, a married man, that his wife was then living and had not been divorced from him. A witness testified that he was present when the marriage took place. With this evidence in the record, it was unnecessary to prove the status of Mary Williams. Lyman v. The People,

prosecution, and, over objection by the defendant, was permitted to testify to the fact that the defendant was her husband. After the case had been closed, on motion of the prosecution, the court re-opened it to permit the introduction of testimony of the brother of defendant's wife, who testified that he was present when the marriage took place. It is in the sound discretion of the court to let in further evidence after a case has been closed. Under the circumstances, we can not say that the court abused its discretion by permitting this additional evidence to be introduced.

while the evidence of defendant's wife was incompetent against him in this proceeding, yet as this case was tried without a jury, and there being sufficient competent evidence in the record to prove the marriage, the error complained of was harmless.

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Insufficient to sustain the judgment. We have made a careful examination of the entire record, and after due consideration of all the evidence submitted and the inferences that reasonably flow therefrom, we are satisfied that the guilt of the left meant has been established beyond a reasonable doubt. As was well stated in Crane v. The People, 168 III. 395, p. 405:

"Section 12 of the act relating to the crime charged provides that the 'offense of adultery shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy.' The statute recognizes the inherent difficulty of proving by direct evidence any single act of adultery. The proof of circumstances which raise the presumption of cohabitation and unlawful intimacy is therefore sufficient to prove adultery."

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

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"socien 13 of the set relating to the orine be sufficiently proved by circumotoness which reine the setates of proving by direct evidence ony the letters of sufficient. The some direct evidence ony the letters of sufficient of unlawful intimacy is therefore our sufficient to over each leavy."

Finding no reversible error, the judgment will be affirmed.

COMPANY TO LA

332 - 21317.

VALIDA DENSBY, Appellee,

va.

HENRY F. UMBRICHT.
Appellant.

200 I.A. 61

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

STATEMENT OF THE CASE. This is an action in tort brought in behalf of Valida Densby, by next friend, against John Umbricht, Clara Ritter (sued by her maiden name, Clara Umbricht), Henry F. Umbricht and Chicago Bank & Office Fixture Co., a corporation, to recover damages for injuries sustained by being struck by an automobile, alleged to be owned, managed and operated by said defendants. Juit was subsequently dismissed as to the Chicago Tank & Office Fixture Co. and John Umbricht (the latter having died), and proceeded to trial as to Henry P. Umbricht and Clara ditter. Henry W. Umbricht, in addition to the plea of the general issue, filed a special plea denying ownership and operation of the automobile in question. There was a trial by jury resulting in a verdict for plaintiff in the sum of \$3250 against both defendants. A remittitur of \$500 having been ontered, defendants' motions for a new trial and in arrest of judgment were everruled and judgment entered on the verdict for \$2750 against each defendant. From such judgment Henry F. Umbricht appealed.

Before entry of final judgment, it was suggested of record that appellee, since the commencement of suit, had arrived at legal age, and all plandings were accordingly

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are in Tole Vent lotte, Clark titter (seed by John and a name, "Lare Unbrieft), from a tobricht and hicego Bank amorphism for the property of the control of the second ralitereim ar ya manda pakat ya bumbalam mekuntak wal alloged to be smeet, numbered and operated by anid defundants. Inde van aubaequerithy diamianed is to the Bheego Tenli : Tries Thrune to, and John temperate (the litter having thed), and proceeded to their as to Heary T. Univident and clare sitter. denry '. Tehridet, in . deition to the place of the general lasts, filed a special plea danying constrains end operation of the subsanballs in quastion. Thurs was a off at Triaminty not solbory , at positioner grap yet later aum of 18250 equinat leth defendents. A resittion of 600 Lairi ton a toll analiar tairsin-bal baneta mand taival deserving but heliminary over immerical to sum as at here ... no be the residence to the contract same be not

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amended by striking therefrom the words "Warshall O. Densby, her father and next friend", wherever the said words appear therein.

Appellees evidence tends to show that on July 18, 1912, the defendants, Clara Ritter and Henry . Umbricht, together with Emil Umbricht, his brother, were riding in an automobile on Jackson Boulevard (in the city of Chicago), in an easterly direction; that when the automobile reached the west line of wood street, it "swerved or "igzaged" in a northeasterly direction, passing over the curbstone and the parkway between the curbstone and sidewalk at the northeast corner of the intersection of said streets, and upon the sidewalk there, where appelled was walking, striking her with such force as to render her unconscious and to sustain injuries serious and permanent. The automobile continued in its onward course, crashing into the porch of an adjacent brick house, and stooping after the forward portion of said automobile had partially descended the basement steps thereof. There was a conflict of evidence as to the speed at which the car was driven at the time and place in question.

was occupied by Clara litter and her two uncles, henry .

Umbricht and Emil Embricht. The evidence of appellee tended to show that these three persons were the only occupants thereof; that the defendant, clara litter, was seated on the lap of one of the two men in question, and that she and the men on whose lap she was seated were jointly operating the car. None of appellee's witnesses, however, identified appellant as the man who was thus jointly engaged. Defendants' witnesses Bahnsen and Rohner, employees of appellant, testified that they occupied the rear seat of said automobile; that it was operated solely by Clara Ritter; that appellant

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was seated on the lap of his brother, Emil Umbricht, and that at no time during the trip in question, did the parties on the front seat of the car change their respective positions. It was admitted by appellant, that he first operated an automobile six to eight years prior to the trial, which was had January 4th, 1915, that so far as he knew, his brother, Emil, never owned nor operated an automobile, and that the latter was a nonresident of Chicago.

MR. JUNTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

The principal question of fact presented by the evidence in this case is, - Did appellant operate, or participate in the operation, of the automobils in question?

There is no evidence of ownership in appellant.

Thile appellee's evidence tonds to show that appellant took

part in the operation of the car in question, such evidence

is uncertain in character and is not sufficient to establish

a case as against the positive denial not only of appellant and

his co-defendant, Plana Witter, but also by that of Pahosen

and Rohner.

We are of the opinion, therefore, that the verdict as to appellant is manifestly against the weight of the evidence. The judgment of the Circuit Court as to Cenry F. Umbricht, appellant, will be reversed, and the cause remanded.

REVERSED AND REMANDED.

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*C. P. Miller C. A. C. C. C. R. W.

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W. E. FISHER, Appellee,

VR.

W. H. DUNH. Appellant

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

2001169

MI. JU CICH MCGORTY D LIVER . THE OFFICE OF THE GOUNT.

W. W. Fisher (appellee here), doing business as W. M. Fisher & Co., brought suit in the Superior Court of Cook County against W. H. Dunn. There was a trial by jury and at the close of all the evidence the court directed the jury to find the issues for plaintiff and to assess his damages in the sum of \$93.49, which was accordingly done, and judgment entered upon the verdict. From such judgment defendant appealed.

The claim upon which plaintiff sued defendant was for groceries and meats sold and delivered. Junn, the defendant, purchased groceries and meats from F. W. Brown . Co., and subsequently from plaintiff, who succeeded W. J. Brown & Co. The evidence shows that defendant, at various times, made payment to plaintiff upon stated accounts. Checks evidencing such payments, drawn by defendant and made payable to plaintiff, are in evidence. The last stated account between the parties was for \$93.49 rendered August 6, 1914. It is contended by defendant that he did not know he was dealing with plaintiff, but supposed he was dealing with P. F. Brown & Co. The only testimony in the case was that of plaintiff and defendant. The evidence shows that defendant made payments to plaintiff on accounts stated as

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follows, - May 4, 1914 - \$50. June 6, 1914 - \$40. July 6, 1914 - \$55. Defendant's contention as to want of knowledge that he was dealing with plaintiff is without merit. There was no conflict in the evidence pertinent to the issues and the court did not err in directing n verdict.

Defendant assigns as error the failure of the court in directing a verdict for plaintiff to give such peremptory instruction in writing. Then a peremptory instruction is given to find for one of the parties it is the better practice to give a written instruction, but the failure to do so does not constitute reversible error.

JUDGMENT APPTRMED.

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375 21362.

ROSS ATTLEY LUMBER CO. a corporation.

Appellee.

VS.

APPEAL FROM CIRCUIT COURT. COOK COUNTY.

COLUMBIA HARDWOOD LUMBER CO., a corporation,

Appellant.

200 T.A. 6

MR. JUDICA MCGOORTY DELIVERED THE OPINION OF THE COURT.

V This suit was brought in the Circuit Court of Cook County by appellee to recover from appellant the contract price of two cars of lumber. With its declaration, plaintiff (appellee) filed its affidavit of claim showing 1419.93 due. The defendant (appellant) filed with its plea of the general issue thereto, an affidavit of merits alleging that said lumber was not up to grade, nor according to contract; that defendent has not accepted same and that plaintiff is indebted to defendant for freight and demurrage charges paid by defendant on said lumber in the sum of 1238.92. There was a trial by jury resulting in a verdict in favor of plaintiff in the sum of \$1399.52. From such verdict the plaintiff consented to a remittitur of 138.95. and, thereupon, motion for a new trial was overruled and judgment entered against defendant in the sum of #1360.57. From such judgment defendant appeals and assigns as error the giving of certain instructions.

The defendant in Chicago, ordered from plaintiff two carleads of guarter oak lumber. "flooded stock, but very well washed and cleaned." Laid lumber was shortly thereafter shipped by plaintiff from Noth, ark., to defendant's order,

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Chicago. There is a conflict of evidence as to the condition of the lumber in question upon its arrival in Chicago. was sold subject to the rules of inspection of the National Hardwood Association, but such rules do not appear in evidence. Upon its inspection by defendant, the latter refused to accept the lumber, and, subsequently, declined to permit a mutual inspection thereof, on the ground that a portion of said lumber was covered with mud, that it was not possible, therefore, to determine how badly it had been damaged by water, asked plaintiff to pay the freight and demurrage charges thereon and take it away. Defendant's secretary, A. H. Schoen, testified that he telephoned plaintiff before defendant removed the lumber from the cars, that it was not up to grade and not what defendent ordered; that plaintiff's representative upon the following day requested defendant to unload the lumber from the cars so as to save demurrage, which defendant did. No part of the lumber in question has been used by defendant and remains in its possession, subject to plaintiff's order.

There was evidence introduced by defendant tending to show that the value of said lumber when received, was \$330 to \$340 less than the contract price.

Defendant's order and plaintiff's acceptance thereof constitute the contract between the parties. There was no express warranty as to the quality of the lumber contracted for, but there was an implied werranty that defendant would get what he bargained for, viz., quarter oak lumber, flooded stock, but very well washed and cleaned.

Babcock v. Trice, 18 Ill. 420; Chicago Facking and Provision Co. v. Tilton, 87 Ill. 547.

The contention of plaintiff's counsel that the

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acts of the defendant constituted an acceptance by it of the lumber in question, is not supported by the evidence.

Defendant after inspecting the lumber in question and rejecting some, refused the request of plaintiff to have an inspection of such lumber made by the National Hardwood Assin. It is contended by plaintiff's counsel that such refusal of inspection, together with defendant's continued possession of the lumber, which possession was at plaintiff's request, was such exercise of ownership by defendant, as constituted an acceptance. "So long as the buyer can, with ut self contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. Blackburn on ales, page 17. The evidence does not show such acceptance by defendant as would constitute a discharge of plaintiff's liability under the contract. Underwood et al. v. .olf. 131 Ill. 425 - 442. The acts of defendant, in any event, did not constitute such an acceptance as would waive the implied warranty as to quality. Babcock v. Trice, supra.

of told the jury, in effect, that if they believed from the evidence defendant accepted the lumber in question it would be liable under its contract, erroneously excluded the element of implied warranty arising from such contract. Norris v. Wibaux, 159 Ill. 627, 642.

The next instruction assigned as error proceeded upon the theory that if the lumber in question was not according to contract and the defendant accepted same, the implied warranty as to quality was thereby waived. " ven when the contract is executory, the claim for damages on account of a breach of the warranty will survive the accept-

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ance of the property. Underwood et al. v. Tolf, supra. Such instruction is clearly erroneous.

The third instruction complained of, erroneously stated what would constitute a constructive acceptance by defendant, and invaded the province of the jury by assuming such acceptance.

For manifest and prejudicial error in giving the foregoing instructions, the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

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THE PEOPLE OF THE STATE OF ILLINOIS.

Defendant in Error,

VB.

LEWIS E. RICE, Plaintiff in Error.

DERROR TO

MUNICIPAL COURT

OF CHICAGO.

2001.A 68

MR. JU. TIC. MCGOORTY DELIVERED THE OPINION OF THE COURT.

This is a criminal proceeding by information charging Lewis Rice, the defendant, (plaintiff in error) on september 22, 1915, with being an inmate of a house of ill fame, at 609 3. Wabash ave., in the City of Chicago. Trial by jury having been waived, the cause was submitted to the court resulting in adjudging defendant guilty and sentencing him to pay a fine of \$200, and the costs of suit, taxed at \$6.

The defendant on above date and for six years prior thereto was employed as clerk in the Queen Hotel, being the premises referred to and described in said information. It is contended by defendant, if he is guilty of any offense under the evidence in this case, that he is guilty of being a keeper and not an inmate of a house of ill fame or assignation, etc.

The principal question presented for our consideration therefore is, - was defendant an "inmate" within the meaning of section 57-a-1, Chapter 38, of the Criminal Code? Said section is as follows:

"57-a-1. Whoever is an inmate of a house of ill-fame or assignation or place for the practice of fornication or prostitution or lewiness, or who shall solicit to prostitution in any street, alley, park or other place

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or providentian or levenue, or who should calledt to

in any city, village or incorporated town in this tate, shall be fined not exceeding two hundred dollars, or imprisoned in the county jail or house of correction for a period of not more than one (1) year, or both."

Section 57 so far as material is as follows:

"57. Moever keeps or maintains a house of ill fame or place for the practice of prostitution or lewdness, or whoever patronizes the same, or lets any house, room or other premises for any such purpose, or shall keep a common, ill governed and disorderly house, to the encouragement of idleness, gaming, drinking, fornication or other misbehavior, shall be fined not exceeding \$200. * * * * "

The evidence tends to show that the hotel in question was a house of assignation under the Statute; that men and women came to said hotel for the purposes of assignation and the circumstances were such that the defendant had knowledge of that fact, and that these circumstances in our opinion made defendant an "inmate" within the meaning of the statute, and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

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HANS NESS.

THE PEOPLE OF THE STATE OF ILLINOIS.

Defendant in Mrror,

vs.

WRIT OF ERROR

TO MUNICIPAL COURT

OF CHICAGO.

176

Plaintiff in Error.

200 I.A. 69

MR. JU TICE MCGCORTY DELIVERED THE OPINION OF THE COURT.

against defendant (plaintiff in error) charging him with obtaining from Eugene Sullivan, the informant, with intent to cheat and defraud, by means of false pretenses, the sum of \$190. Trial by jury having been waived, the court found the defendant guilty in manner and form as charged in said information, and sentenced him to the House of Correction of the city of Chicago for three months, and further to pay to the Clerk of the Municipal Court of Chicago, a fine of \$200 and costs of suit.

Ness, the defendant, entered into a contract with the said Sullivan whereby he agreed to do certain carpenter work on Sullivan's dwelling house, for a certain stipulated sum. Defendant at Sullivan's request performed other work on said house in addition to that specified in their contract, for which work defendant, as a result of compromise, accepted \$190 in full settlement of all claims against Sullivan. On the day following, defendant executed and delivered to Sullivan a statutory waiver of lien as to said premises. Sullivan and his wife testified that said \$190 was paid by Sullivan to defendant upon representation by the latter that all bills for labor and material furnished had been paid. Defendant testified that at the time of said

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ogainst codemient (plaintiff in error) charging him with totact cotaining from Engage Sullivan, the informati, with totact cotaining for and coffeed, by guara of false protesses, the curtainter defends for an extension and contessed from the foure of the contessed from the fourth of the city of the luntime to the fourt of the further to the the Clerk of the luntime to the fine for the luntime to the the city of the luntime to fine course of this or the contessed of this or the luntime to fine the fine luntime of the course of the luntime of the course of the luntime of the luntime of the course of the cou

Ness, the defendent, entered to a continet with the said Salisan absenty in agreed to do do tain or product verk on aliatest deviates acces, for a contain nitediation of make on aliatest of a said time to the archive a contain nitediate on and because to a said the archive and an archive and aliatest for a said and an archive aliatest and and history and archiver all the archives by and aliatest and aliat

settlement, he stated to Sullivan that there were unpaid bills in the sum of \$400 for material used by defendant on said property. Defendant further testified that subsequent thereto, he offered to pay the Hines Tamber Company for lumber used by defendant on said property in monthly installments. which offer said company declined to accent. There is no evidence of any lien filed on informant's premises by any subcontractor, nor that informant has received any notice or claim for such lien, although the information havein was filed more than four months following the completion of said work by defendant. We do not think defendant's intent to cheat and defraud the informant has been established. In State v. Hurst, 11 W. Va. Reports, 54, 75, the court there held that a man cannot be held guilty of precuring manay by false pretenses, with intent to defroud, who has morely collected a debt justly due him, though in making such cellection he has used false pretenses. In the inctant case, the informant by his settlement with defendent impliedly admitted he was justly indebted to the latter. The parties acted within their legal rights in making such settlement, subject to the rights of subcontractors. There is evidence tending to show that affendant, subsequent to the settlement in question, made payment to certain subcontractors, and tendered payment by installments to another. In this state of the moord we are not convinced that the assential alement of intent has been established. The judgment of the Punisipal Court of th cage is the refere reversed and the cause remanded.

REVERSED AND REMANDED.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Hon. DUANE J. CARNES, Justice.

Present -- The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk. 200 I.A 1

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day of September, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

THE RESERVE OF THE PERSON OF T

THATSTOPHER O. BUSTA.

Gen. No. 5921.
Old Colony Life Insurance
Company, appellant.

VS

Appeal from Kane.

Helen L. Graves, appellee.

Nichaus, J.

Die Colony Life Insurance Company, minst he alies Helen L. Craves in the Circuit Court of Fine County, to vacate in set aside a judgment recovered by the series, against the Cosmopolitan Life Insurance Companye Association on Jule 1, 1:29, for the sum of 1805.25 and costs of soit; and to restrain the another, from prosecuting the suit consended by let, an or about my 6, 1910, a sinst the content of the fillment recovered sinst said Cosmopolitan Life I surance Resociation. From a fundament for definition of the description.

The bill of complaint as unended, alleged, that the Oka-Colony Life Insurance Company a corporation existing by virtue of the law of this state, as an old li e reserve insurance company; and that the Cosmopolitan Life Insurance Association, on and prior to September 9, 1909, was a corporation existing under the laws of this state, and doing insurance business on the assessment plan; and that this Cosmopolitan association had prior to July 1st, 1901, been known by the name of the Knights of the Globe Mutual Penefit Association, That on September 9, 1909, the are lent Ol Colous -Insurance Company, entered anto an agreement with the Cosmopolitan Life Insurance Association by which the Old Colony Company promised, in consideration of receiving all the assits of the Cosmopolitan Association, to assume all of the liabil-Ities of the Cosmopolitan Association then existing, and which

11-7 .- 0 . n=0 DES COLORS MIT THE AND LANGE ASSESSED. wind tob. Atten FT section of section of decision A CHOICEAT THE WHITE SIDE m. of town or , growed-en-it-inof the a judgment recovered by the Levelley meinet the To builten Life Insurance Companya Association callifered; . . The sum of 01605,25 and costs of suit, and to redenie de a estables, from prosecuting inch son broke hi with sold front to a plant कार कि अविवासिक प्राप्तिक है। इस कि सामित कर कि कि स्वार्थ के स्वार्थ के सामित के स ron twent, with medilogoment less family that up the Langive Lean Bl. the said them the said, beauter as receipt the fire but Guern Life Insurance Cornany de a commonstron austing ign Le inw of this elete, as en old it e reserve issuralseld someth sof this C secondition life to the (years) A con and proper to September by ISDB, were now an Dian wider the tree of this earns, ind ding in the co. millis on the resease att plant, and i at this Communities out the said of the death lest like the term of the control of the and the Mailine of the Olors, " check have the countries and ptember 2, 1500, the emission into the minument. ontone in the contract of the ញ្ជាក់នៅ ម៉ាន់ពី ២០៦ ភេទ ១៧ សូមី សមាននិងនាំ១០១១៩ ខែ១៩៩៩១២ **នី ១៦៤** ermen – i di rabato en lo colitaneble

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might exist, on and after the date of the agreement.

It is alleged in the bill that the appelled recovered the judgment mentioned against the Cosmopolitan Life Insurance Association, for an amount claimed to be due her upon the certificate of membership issued to a pelies husband, Frank B.

Oravesa, by the Inights of the Globs II that I mail: Amacciation, the predecessor of said Cosmopolitan Association; that the circuit court of Kane County was without jurisdiction to render said judgment mainst the Cosmopolitan Association, and cause that Association was never legally served with automorary the surmons upon frich aid judgment is used, having her nerved upon one J. O. Myers, as ment of said Cosmopolitan Association; and that the Cosmopolitan Association did not learn of the pendency of the suit, or the rendition of said judgment, until about September 9, 1909.

The bill also alleged that the appelles had, prior to the cornect and her purt and inst the Cornect of Maconitan Association, from all claims and demands which she may have had by reason of said certificate of membership.

The bill also alleged that Frank E. Graces, the insured on the 25th.day of August 1907, forfeited his rights in the insurance vertificate, for non payment of membership fees payable on that date; that, in order to become r instated in the Cosmopolitan Insurance Association, he had signed a rainestatement health certificate, in which he made a warranty that he was at that time in good health, and sid not have any disease or serious illness; and had not taken me icine, or had any medical attention, nor had been treated by a physician, since

the judgment moderates of the collision Life To read Association, or an realist of state to the testion to the tilicate of estatisticate of estatisticate of estatisticate of estatisticate of estatisticate of estatisticate of the linights of the tilication of the linights of the tilication of the linights of the tilication of the tilic

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representations of early Frank E. Graves were untrue; that it was agreed in said reinstatement certificate, that in case they were untrue, the certificate of membership should be held null and void; and that the same was therefore void; and that, because of the matters alleged in the oill, the jungment recovered by appealles is unjust, inequitable and void.

The answered and filed a cross bill, praying for affirmative relief, and asking for a de ree to compet the contract to pay the amount which are claimed was one her on the membership certificate, and on the judgment which she had recovered. The circuit Court heard the evi once offered by the parties upon the issues presented by the bill and cross will, and rendered a Jecree ismissing the original bill for anti-off equity, granting the prayer of the cross bill, and count appeals recover relief the cross bill, and confident that appeals recover relief the cross bill, and confident the judging that appeals recover relief the cross bill amount the judgment a sinst the Cosmo belief I a races association be adjudged satisfied.

The cord discloses many controversies; he a number of cont sted questions of fact and law is raised on this a personal in the area. It is peare from the evidence, that Frank F. Graves, inclusional of a teller, filed an a plication in ambierahip in the injects of the Globe Mutual Benefit Association, about May 23, 1895, at Elgin Illinois; and that a xxix mx certificate of membership for the sum of \$2000 insurance, for the benefit of his wife Helen L. Graves was issued to him on that date. The certificate contains the following provisions:

That the Knights of the Globe Mutual Benefit Association agrees to pay to the beneficiary, the sum of the insurance, in consideration of * * * * the sum of \$5.00 * * * * and of the payment of such other sums of money for assessment for

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Also the following provisions:

"It is understood and agreed that the application of the insured to whom this certificate is issued, now on file in the office of this association and bearing even number herewith, to ether with this certificate and the By-Laws of this association, shall constitute the complete and only contract between the aforesaid insured and themselves."

The following is the provision contained in this the certificate concerning the assessments to be paid, an the manner of paying them:

"And it is also understoom, covenanted and agreed: (1) that the aforesaid insured shall be liable for assessments for mortuary claims according to the table of rates prescribed in the By-Laws of said association, and for the fues for expenses as required in said By-Laws, upon due notice given to him in the manner prescribed in said By-Laws."

On the back of the certificate, under the head of "Important instructions and information", appears the following, concerning notices, dues and assessments:

"Notice of dues and assessments due will be promptly mailed in time to reach all members on or before the tenth day of the month."

Also the following concerning advance payment by members:

mortuary claims and ernemes in acid Association coording to the By-Laws ness and provided by a series that the by-Laws ness and provided by a series that the rioreshid inside of the size of the series of the seri

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"Members lishing to avoid the incommentation of aring small payments, or the danger of lapsing arising therefrom, may male advance demosite in the arount desired. Any unused portion of such advance payment or deposits, shall be payable with this certificate at its maturity, in addition thereto. Traveline members or others, who do not receive their mail regularly, will find the advance plan much safer andmore convenient." In a firence to the amounts and number of a segments, thich the members of the association were to pay, Section 3, Article 5 of the By-Laws of the Association, in force at the time of the lasmance of the Graves Certificate, crovides, that on a pertificate of 2000, each wemner small pay a small a nuar assessment into the general fund, to pay the expenses of the association, of 1; and Section 7 rovided, that mortuary assersuents should be sade unon all embers to pay on the swount of funds, as often as required to pay losses according to the Taket table. The table referred to fixed the amount to be caid upon the Graves certificate at \$1.00.

The provision in the by-laws, about the notice of assessment to be sent to members, as follows:

"A notice of an assessment delivered to a member, or last at the insured a residence or place of business, or market post and to his post office address as last furnished to the Secretary of this association by such member, shall be considered duly served."

In the year 1901, the name of the Knights of the Clobe Mutual Benefit Association, was manifed to Champpelitan Insurance association. The latter association adopted a new set of by-laws in 1905, by which the directors made monthly assessments when necessarys, to be paid by members for the mortuary fund; it also raised the table of rates, and increased the assessment levied against certificates like the one held by Graves, from \$1.00 to

Lists gainer to conclusional est Steve of galdete on the est the danger of speing esteens that or the collons, they advence Pandahte in the count of the Survey and states. the savence payment or decosive, chaif he expelse with this intlevent .oterent consens at tyrinates at its estat to , which the rest of the contract of the rest regularity, ". In the thermode administration of the month of the antio creres to the amounts and mome r of accessants, and blue of the abgoodables were to pay, Suction by Article 5 o de Eyelland of the Jeacolation, in horde in the tire of ance of the Craves Certificate, provides, that on a Lumin Lines a gag illy a radien mais , udiel to state : ... and to meansons sit was out than the monarce of the June better skylle seems. Director alter at Maria amounts sdf or gailucos seesal yay of Semi per as sallo as table, it s table referred to fixes the amount to be unon the Graves certificate at \$1.00.

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ol tron. The latter treatment on the ed a sec of by-lane in and the treatment of the control of

\$1.70. The by-law with reference to notice to be given to members, of assessments, remained the same.

About eight years prior to his death, the insured, Frank Craves, in following mis trade as a printer, moved away from Elgin, and took up a residence in different parts of the country; and thus took up a residence in St Louis, in the early part of the year 1907; and later in the month of April, settled in Nashville, Tennessee. It is evident, from the proof offered on he trial. Lat he insured gept the association, of high he association member, constantly informed of the changes of his residence; and upon his removal to Nashville, from St. Louis, in 1907, he sent a notice giving his address at Nashville, to the secretary of the Cosmopolitan Association, It had become a matter of custom, between him and the association, to send money for his assessments in sums of \$5.00; and sometimes he sent \$8.00 and 16.00; and so stimes these amounts were sent in advance of mortuary assess ents made by the association. When the amount so remitted was used up, the secretary of the association would notify him to that effect, and he then would again remit money. This custom prevailed abring practically the whole period of his membership. The amounts remitted by him were applied in payment of the assessments which had become due, and which thereafter became due. In this way, he sent the sum of xxx. \$5.00 about the 25th. of April, 1907, after his removal from St. Louis to Mashville; and the amount sent was applied by the Cosmopolitan Association, to pay assessments levied a sinst his certificate. No notice to pay further assessment was received by himuntil about August 26, 1907, when he was notifized by the secretary of the association that it claimed a balance of 60¢ due on the July assessment, and the full assessment made for the month of August. The secretary also sent him a so called

health certificate, or reine larget on a rount of a for all 123

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American party to bis death, the instruction Trank , Traves, in follo for his trade to orinter, moved away from in, and rock on reminence in any area justs of the country; and thus took up a residence as fo bouts, in sis early part of of the 1807, switter in the month of toril, estilled in Paris-Mills, Inches In the second of the second second ---- the insured jest the equoistion, of which he was a member, constantly inferent of the changes of his residence; of son his renasel to deville, trom St. Louis, in 15 7, he ent a notice giving the andreas at Banvilles, to the secretary is Tall a & a cos | ben of , not second a life for or so a cases, between how red to association, to send modey for 118 naces ants in sums o' [8..0] of so the sent file of the CO. blust moldsimists of he main has not as head out facilities notify him to that effect, and he then would egain remit money. To bolized story she that the transfer who will be head of the contract of the bolized of the contract of the bolized of the b and derening the amounts resided by him were ended agment of the assessments which had become due, and which o _eafter' became oue. In this way, he sent the sum of AES. \$5.00 store the SStar of total, 1997, efter his removal from St. Louis to Bahville; are ton accure cant was analisd by the all benchmark belong blockers but it works with bright and 120 country teritoria ala coministra vellara que al sultan or sensitivado 🦞 🔝 ದಲ್ಲಿಯ ನಿರ್ವಹಿಸುವ ನಿರ್ವಹಿಸುವ ಕ್ಷಮ ನಿರ್ವಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿರದಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿರದಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿರುವ ನಿರ್ದಹಿಸುವ ನಿರ್ದಹಿಸು ನಿರ್ದಹಿಸುವ ನಿರದಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿರ್ದಹಿಸುವ ನಿ le speniel : Daniela :: thea moditionera said in grater of eber durca sees lind sit is jameneeseas ylu, odu 🕠 🗥 feller of and the cole process of tempet to the

of his membership. This health certificate he was directed to sign and return. Thereupon about reptember first, he remitted to the secretary the amount, which the Association figured covered the Talance of the assessment claimed by the association to be due for July, and the assessment claimed by it for August and September. At the same time, he signed and returned the so called health certificate, changing it, nowever, by writing across the brinted worranty concerning his health, the words:

"Miscarria e of notice of assessment". The insured made remite tances after that time, fully covering the amounts which were assessed against him, by the association, for the remaining months of the year 1907, and part of January 1906. He died or December 11, 1907; and proper proofs of death as required by the rules of the association, were made out and sent to the association.

About five weeks after the death of the insured, one C. Schadel, who was a director of the association, called edant obtained under the insurance certi ic te, by mayin her 5:0. Aft-rwards on the 8th. May of December, 1908, the appealed to tended a s it in the circ it court of Wane County against the Cosmo, of itan Life Insurance Association, to recover the balance she claimed to be due her on her \$2000 certificate. Summons was issued in this suit and served on J. O. Myers, December 10, 1908 as agent of the defendant association; the president of the defendant association not being found in the county. The service was made by leaving a copy of the summons with Myers, which copy ne mailed, pustage pregmid, in r unvelope aving a retail CAT On 18 to the address of the secretary of the association, W. W. Hrappe Freeport, Illinois.

A notice of the suit which had also been commenced, was

of Jeto Tiber and Jenily correlated and the city of Jeto To of m and raturn, Therengon shout Regulanest Siret, he remitted of the secretary the amount, which he association figured correct the laborators of the mesessant circled to see careful or July, and the assessment clearsh by it for August and communication of the action of the commendation of or culled health certificate, enanging it, no ever, by writing THE REST AND LESS OF THE PERSON NAMED IN THE RESERVE AND ADDRESS OF THE PARTY AND ADDRESS. tig s of notion to messeament". The menus a remited messer temite. and a siter that the the lully covering the smoonts which were own sed alegar him, by the asocoats as for the reminant of the year 1907, and cart of January 1805. He case on or ill, 1807; and proper needs of death as required or on of the east two shor area, north coas add lo sell on anord aloness

About the weeks ofter the neath of the ire rea, one malian, moissenses end in rosperso e are our laber. Dentation T. u u ...ce, and markens from her a raisese of her carin this to to the intro, he far or this southweit but the on a Sta, day of Dacemerr, 1863, the worstack conserses . I ha the crrait court of this Courty spinist the Gescovelitzs Als I grance Association, to recover the college and cost sa to of disher caller "2000 certificate, furrons was treased th to suit and marved on J. O. Eyers, Pacember 10, 1.05 : t went ofelendant association; the president of the necessary as Jet in hon not being found in he courty. The nervice and or icenting a cory of the surrous with Tyers, tion cory or the dependence or and all of the second and the to you address of the secretary of the secretary by the Charles

in a letter, posta e praprid to the cores of the Association at Freeport, Illinois, on December 9, 1908.

No steps were taken by the association, to defend against defendant the claim of the appelles, and on June 1, 1909, a jungment was rendered by default, against the association, in favor of the defendant mostles, for \$1605.25 and costs of suit; and this judgment much the one sought to be vacated by appellant.

It also appears from the evidence, that on the 9th.

May of September, the appears entered into a contrict with

the Cosmopolitan Life Insurance Association, whereby in consider
ation of the transfer to it, of all the assets of the Cosmo
politan Association, it agreed to assure all the liabilities

of the association for death claims then existing, it that might

thereafter exist. On the users of this contract, the appellant,

on May 6, 1910, commenced the suit referred to in the bill

of complaint things the appellant, to inforce payment of her

judgment, and the procedution of the latter suit the appellant

also seeks to enjoin in this proceeding.

In support of the claim for the relief sought by the bill of complaint, appellant contends that there was a forfeiture of the insurance certificate held by the insured, on account of the failure, by the insured, to pay the assessments due for July and August 1907; and that the insured, by signing the reinstatement and helath certificate, dated September 1st.

ERKAR acknowledged that these seresseems ere is in that he had failed to pay them; that he thereby also acknowledged that there was a forfeiture of his certificate; that in the lainstate ent certificate, the immunes that in the concerning the condition of his health, which were untrue; that it was expressly agreed in said **EXEM** health certificate

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Appellant also claims, that the judgment which was obtained by the ampelles, a ainst the Cosmopolitan Life Insurance Association, was invalid because J. O. Myers, the person upon whom the summons was served as agent of the association, was not in fact, its agent, and that therefore, the court did not have jurisdiction of the association, as a party defendant in the suit.

We will first consider the questi n of the forfeiture of the insurance certificate. It is clear that the right xxx almed to forfett the certificate, as on account of the ins redie failure to pay assessments to the association, and that those assessments were based on the advanced rates fixed by the association, under its new by-laws. As a matter of legal right, the association could not shiorce those advanced lates a aliast the insured; the only rate for which he was liable was the rate fixed by his ins rance contract; no this insurance contract was empraced within the terms of his application for embership, his membership certificate, and the By-Laws of the Knights of the Globe Mutual Benefit Association as they existed at the time of his becoming a member. By this contract his assessment was fixed at the rate of \$1. per assessment; and he was not obliged to pay the higher rate of \$1.70 per assersment, which was fixed subsequently, by the new by-laws . (Peterson v Gibson

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191 Ill. 365; Covenant Matual Life Assn of Ill v henther, 138 Ill 431.) Furthermore it does not appear that the notice of assessments, which is provided for bySection 4 of Article 5 of the By-Laws of the Knights of the Globe Mutual Benefit Association, was mailed to his post office address; and this was required, before a forfeiture could be declared and made legally effective.

It is clear, that the right to declare a forfeiture, was dependent on the giving of the notice, as well as the failure of the insured to pay the assessment which he was obliged to pay.

(M. W. Traveling Men's Ass'n. v Schultz, 148 Ill. 304.) Forfeitures are not favored in law.

"Before the defense of forfeiture because of non-payment of assessments can prevail, it must not only appear that every step necessary to constitute a legal assessment has been taken, but also that the member alleged to be in default has been notified in the precise manner specified by the rules and regulations of the order." (Farmers' Fed. v Croney 106 III. App. 425.)

If the \$5.00 sent by the insured about the 25th, of April 1907 paid the raised assessment, within aC cents, to the insured the month of July, then according to the rate which the insured was obliged to pay, the amount sent was sufficient to pay his legal assessment, not only in full for July, but also for August; and hence his assessment for July and August, as a matter of equitable right, must be considered as paid. No right of forfeiture therefore existed; and it is obvious that in there was no light of RAXINELEXER orfeiture on account of non any and of assessments, none could be legally enforced. Nor was the insured estopped to deny the forfeiture because he had signed the reinstatement health certificate. (Cov. Mut. Life Ass'n v Tuttle, 87 App. 309.) If the Cosmopolitan Association had no legal right to enforce a forfeiture of the insured's membership in the Association, then it follows, that he did not bloss such

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thed to his ough office andrees; so this was relared.

It is clear, that the right to recurs of forferbure, we all no on the pitting of the notice, on wall as the frihuse innounced to pay the gassey mank, think he tas childed to pay.

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embership; and that the Association noo no right to exact s certificate to reinstatement, or require the insured to sign a reinstatement certificate; not a signin of the certificate of the insured, had no legal effect whatever upon the status of his membership.

Moreover it appears clearly, from the certificate itself
that the insured did not intend to make, and as a matter of fact
did not make the warranties concerning his health, which it is
claimed that he made in the certificate. By writing across the
mrinted ords xaxxxxxix containing the arranties mentioned, the
ords "miscarriage of notice of assessment" he clearly indicated
an intention to avoid making any stage ent concerning the warranties;
and that he expected his reinstatement to be based upon the supposed miscarriage of a notice to him, of the assessment. We
are therefore of opinion, that there was no legal forfeiture
of the membership of the insured; nor of his certificate of
insurance.

Upon the question of the validity of the release, it is evident that the circumstances under hich this release was obtained, and the me as employed in obtaining it, as shown by the evidence, rendered it invalid. When the director of the Association, who journeyed to Tennessee for the purpose of obtaining this release came to the america, she was in a distressed and nervous condition bordering upon mental and physical collapse. She was still suffering from the effects of a physical affliction, which had befallen her; was greatly depressed on account of the death of her husband, and worried because of the illness of her son, and the illness of her mother, whom she was nursing, and who was under her inhediate care. The evidence shows the normal exercise of her will power; and, incapable of ke the normal exercise of her will power; and, incapable, on account of her condition to transact positions of importance. It was an account of her condition

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and the sense approved in gotarming it, as abown by the evidence, and the invalid. The ship site of the deposition, and unapped to Tennesses of obtaining this release to the appairables, who was an adistressed and nervous condition.

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est med and nervous as to be indepointed in its to the area of the contract to the area of the contract to the

and incapacitated woman, that the valiant acceptor of the Cose sopolitan Insurance Association concentrated has unin sired poser of intellect and argument; and he set out to commince her that the Association was really foing in act of Henevolence in paying ter \$500 instead of the \$2000 which was the her. She as a told her that she had no legal claim against the Association, and could not collect anything; that she could not afford to go to law, because if she went to law, the case would be tried in Illinois, and would take perhaps six years to dispose of it; that her husband had committed perjury, in swearing to a sealth certificate; and, if she brought suit, her husband would be branded as a perjurer; and she, as a perjurer's wife; that she could not afford to have a law suit which would disgrace her caildren, and her husband; and if she is not take the '50 offered to her, she would get nothing. He admits that he told her in the negotiations for the settlement, that her husband had sworn to something that was false, in the health certificate; and that it would be better for her to make this settlement; and that, in her weakened and enervated confittion of our m mind, which he was fully aware of, he talked to her for an hour and a half to induce her to make the settlement. And there is no loubt, thut she was induced to sign the release lectuse he upon her the belief, that he was acting in her interest; and by playing u on her fears, in making representations hich were false. A release from liability, obtained under these circumstances, cannot be sustained in equity.

It is not necessary to discuss at length the other point raised by appellant; namely, that Myers, the person upon process was served as agent of the Association, was not legally the agent. The proof shows, that Myers attended to a number of matters for the Association that persons who are agents usually attent to,

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such as taking amplications for membership, collecting dues, and remitting them to the Association; also preparing I ofs of death, and taking charge of them for the Association; and receiving the drafts in return, from the Association, to pay for death claims, for delivery to the beneficiaries; he also took releases of such claims for the Association. He undoubtedly stood in the position of an agent of the Association; and would be jenerally regarded as such; certainly outside parties, and the public generally, would be justified in so regarding him.

In Crowley, Cook & Co. v Sumner, 97 Ill. App. 304, the court says, in passing upon the question of agency in connection with service of process:

"The language of the statute is broad * * * * * it should receive a liberal construction to effect what was clearly the intention of the legislature to secure. Corporations doing business over rade areas of territory, are practically beyond the jurisdication of local courts in such territory where the business is done, that a territory where the business is done, that a territory where the formulatives there found. That a representative for limited purposes may be an agent for purposes of service under the statute, is plainly seen from the fact that not only a general agent may be served but also any agent may be served."

It is apparent that Myers, at the time of the service of the summons, seemed to regard himself as an agent; he made no objection to the service on the ground that he was not an agent; and did what any agent would do, after he was served -- transmitted the copy of the summons to the proper officer of the Association.

And the Association seems to have re-arded the service of summons upon Myers, as agent, as proper; for it never questioned such service. The Association undoubtedly not only had notice of the service, but of the commencement of the suit. There is

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in the record, which can rebut the presumption that he Association received the copy of the summons, which was mailed by Myers to its secretary, in due course of mails. Nor is there anything to contradict the assumption, that the Association received the notice of the commencement of the suit contained in the letter which was mailed by appellee's attorney, postage prepaid, about the time of the service of the summons. If the Association thought it had the right to question the legality of the service of the summons, it had ample time and opportunity, between December 19 \$908, and the first day of June 1909, to do so. Not having availed itself of its opportunity, in the court where the suit was pending, the Association clearly was guilty of laches; and laches is a bar to relief, in a court of equity, (Allen v Smith 73 Ill. 331; Rhs Blackburn v Bell, 91 Ill. 434; Migine v Bullock 73 Ill. 206; Walker v Kretzinger, 48 Ill. 503.) Furthermore, a court of equity will not lend its aid, to set aside a judgment at law, for want of proper service of process, unless it appears that there is a meritorious defense to the judgment; or to the claim upon which the judgment is founded. This doctrine is well settled, and was upheld b this court, in the case of Cadillac Automobile Company v Boynton, 143 Ill. App. 381; and the decision in that case was afterward affirmed by the supreme court in 340 Ill. 391.

It is apparent from the record, that there is no meritorious defense to appellees claim, or to the judgment which appellant seeks to vacate and annul. It was entirely proper for appellee to file her cross bill, and ask for affirmative relief in this proceeding, because such relief pertains to, and is a part of, the subject matter of this suit. Where a court of equity has jurisdiction of the parties, and the subject matter of the litigation, it has authority for the purpose of

In the record, which sent which the presentation is the Agriculture for a copy of the corrows, which ace saited by "ere activated by "the activation of the content of the common sent of the common sent of the soft content of the common sent of the content of the common sent of the content of the common sent of the soft content of the content of the content of the the the common sent of the sent of the sent of the content of the time of the sent of the content of the time of the sent of the content of the conten

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73 Ill. 206; Walker v Wretzinger, is Iil. 202.) Furthermore, a court of equity will not lend the ald, to met aside a judgment

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the parties which are involved in the litigation. (Coleman v Connolly, 242 Ill. 583.) The court did not err in decreeing the relief prayed for by appellee in her cross bill. Appelless claim and judgment was one of the liabilities which appellant had assumed under its contract with the Cosmopolitan Association.

It was, therefore, proper, in as much as the claim and judgment wars valid, and a subsistic colimation of appellant's contract it should be required to pay the same.

We find no error in the decree, and it should be affirmed.

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STATE OF ILLINOIS, second district. ss. I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
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There a benefit insurance certificate provided that the insured should be liable for assessments for mortuary claims according to the table of rates prescribed in the by-laws of the association, and that the insured's application then on file in the office of the association, said certificate, and the by-laws of the association shall constitute and only contract between the insured and said association, and such association thereafter changed its name and adopted new by-laws increasing its rate of assessment, held that the only rate for which the insured under such certificate was liable was the rate fixed by his insurance contract as embraced within the terms of his application for membership, his membership certificate, and the by-laws of the association as they existed at the time of his becoming a member, and he was not obliged to pay the higher rate fixed subsequently by the new by-laws, and such certificate was not liable to forfeiture for the insured's failure to pay such higher rate.

Forfeitures are not favored in law, and where the by+laws of a benefit insurance association provided that assessments for mortuary claims should be upon notice mailed to the postoffice address of the insured, held that the right to declare a forfeiture of a certificate issued by such association was dependent on the giving of the notice as well as the failure of the insured to pay the assessment which he was obliged to pay.

Where a benefit insurance association has no right to declare a forfeiture of an insurance certificate, such association may not exact a reinstatement health certificate from the insured, and such insured is not estopped by having signed such health certificate from denying the forfeiture of his insurance certificate, nor has such health certificate any legal effect whatever upon the status of his membership.

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Fig. 1. The second in the last end of the following interest in the second of the second in the second of the s

The words "miscarriage of notice of assessment" written by the insured under a penefit insurance certificate across the printed words containing warranties as to nealth in a health certificate sent to and signed by him for the purpose of reinstatement under the supposition that he was in default for nonpayment of an assessment; clearly indicate his intention to avoid making any statement concerning such warranties; and that he expected his reinstatement to be based upon the supposed miscarriage of a notice to him of the assessment.

A release of liability of an insurance association signed by the beneficiary under a benefit certificate issued by such association cannot be sustained in equity where such release was procured from such beneficiary through misrepresentations by a director of such association while such beneficiary was so laboring under physical and mental distress as to be incapable of normal exercise of her will power and of transacting business of importance.

Where service of summons in a suit against an insurance corporation was made, the president of such corporation being without the county, by leaving a copy of such summons with a person within the county who had been attending to matters of such corporation as agents usually attend to, and who received such copy of summons without objection and transmitted same to the proper officer of such corporation nearly six months prior to judgment on default in such suit, and no cuestion was raised in the court where such suit was pending by such corporation as to such service, held that such corporation was guilty of such laches as hars it in equity from relief against such judgment in the absence of a meritorious defense.

A court of equity will not lend its wid to set aside a judgment at law for want of proper service of process unless it appears that there is a meritorious defense to the judgment or to the claim upon which the judgment is founded.

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Where suit is brought by one insurance company to vacate a judgment recovered against another insurance company whose assets were acquired and liabilities assumed; by contract between the two companies, by such former company, and to restrain a suit brought against such former company to enforce such judgment, it is proper for defendant to file cross bill and ask and receive affirmative relief against such former company under such judgment and contract.

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AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand fine hundred and fifteen, within and for the Second District of the State of Illinois:

Hon. DUANE J. CARNES, Justice.

Present -- The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS / Justice.

E. M. DAVIS, Sheriff.

CHRISTOPHER C. DUFFY, Clerk. 200 I.A. 96

Feb-1.196

BE IT REMEMBERED, that afterwards, to-wit: on DEC 27 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6076.

Julia Jacobson, appollant.

VS

Appeal from LaSallo.

Joseph M. Ramey, appellee.

Dibell, P. J.

Joseph M. Rangy owned a building in the city of Streator that had a stairway on the outside of the building. Mrs. Julia Jacobson was on said stairway when a board thereof gave way under her and she fell through to the ground and was seriously injured. The brought this, wit against Rune, to reover unnthorses. Te Tiled a doct ration containing three country. Defendant did not demur thereto, but filed a plea of not guilty. There was a jury trial, and evidence for the plaintiff was heard. Plaintiff offered in evidence a lease of said building grom Ramey to her husband, Samuel Jacobson. Defendant objected and the court reserved its ruling. At the close of the plaintiff's evidence the court sustained the objection to said lease. Thereupon plaintiff by leave of court filed an additional count, The accident was on October 31, 1913, and the additional count was filed January 23, 1915. No demucrer was interposed thereto but defendant filed a plea of not ; wilty and a plea of the Statute of Limitations. Plaintiff demurred to the plea of the Statute of Limitations and that demurrer was overruled, and plaintiff abided by her declaration. The plaintiff again offorcd the lease in evidence and the court sustained an objection thereto, and granted a motion ke by defendant to exclude all plaintiff's evidence and instructed the jury to return a verdict for defendant, and this was done. Motions for a new trial and in arrest of judgment were denied, and defendant mad judgment in bar, and plaintiff below appeals therefrom. App that the original declaration did not state a cause of action, an! that if any cause of action for plaintiff has ever been statul, it is in the amended declaration, filed more than two

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year; after the injury, and that the statute of Uniterious

A plaintiff may amend his doclaration or file an add4 tional count stating his cause of action in a different way after the Statute of Limitations has run, without subjecting his action to the par of the statute, as held in Swift & Go y Foster, 163 Ill. 50, and in many other cases. If the cause of action set up by an amendment to the declaration or by an additional count is a new one and not a mere re-statement of the cause of action set out in the criginal declaration, such amendment or additional count will not relate back to the commencement of the suit; and if the Statute of Limitations has run before said new cause of action has been stated, the plea of the statute will be a defense to said new cause of action. Wylenfeldt v Illinois Steel Co. 165 Ill. 185; Mackey v Northern Milling Co. 210 Ill. 115; McAndrews v C. L. S. & F. Ry. Co. 222 Ill. 232. This rule is re-stated, upon the basis of the foregoing and other suthorities, in Rabr v Mational Safe and Deposit Co. 7234 Ill. 101. One of the three essential alements of a cause of action which the plaintiff must aver and prove in such a cause as the one now before us, in order to entitle him to recover, is the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains. But an allegation in such a declaration that it is the duty of the defendant to do or to refrain from doing certain things is only the averment of a legal conclusion and is an insufficient pleading. The declaration must state facts from which the law will raise that duty. This is fully stated in McAndrews v C. L. S. & E. Ry. Co. supra. and in many other cases.

There is a class of cases where a supposed defect in a declaration has been presented to the court after verdict.

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The general principle is, "where there is any deficit defect, imperfection or omission, in any pleading, whether in substance of form, which would have been a fatal objection upon demurrer; yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively winted or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the vordict." 1 Chitty's Pleading, 675; Keegan v Kinnare, 193 Ill. 280. In Western Stone Co. v Whalen, 151 Ill. 472, notwithstanding the omission from the declaration of the necsssary allegation of knowledge by the defendant, the declaration was held good after verdict. So in City of Fast Dubugue v Burhyte 74 Ill. App. 99, and 173 Ill. 553. the declaration failed to aver wither actual or constructive notice to the city of the defective condition of the sidewalk which caused the injury there involved, but it was held good after verdict. In W. K. Fairband Co. v Bahre, 213 Ill. 636, the declaration in term did not in terms aver a certain material fact. The defendant did not demur but pleaded the general issue. The court concoded that a careful pleader would have expressly averred the fact but held that it was fairly inferable from the fact alloged that that particular fact was intended to be charged. It was there said that on demurrer to a declaration mere inferences or implications from facts stated cannot aid plaintiff, but that where defendant woes not demur but raises issues of fact and submits them to a jury and is defeated, the court will andulge in intendments in favor of the sufficiency of the declaration and will regard as sufficiently alreged any material fact fairly and reasonably inferable from facts stated

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in the declaration which may fairly be presumed to have been proven; and if the material fact is fairly inferable from the facts alleged and may fairly be presumed to have been proven the judgment will not be arrested because of the absence of an express allegation of such material fact from the declaration O'Rourke v Sproul, 241 Ill. 576. Mueller v Phelps, 252 Ill. 630.

While this question has usually arisen after verdict and it has usually been said in such a case that the declaration is good after verdict, yet there is also a class of cases where the same principles have been applied where the question arose before a jury trial. In North Chicago Rolling Mill Co. v Monka, 107 Ill. 340, the chief ruling complained of was before the trial of the cause, and the question raised was whether a certain additional count was for a cause of action in substance other and different from that stated in the first count. It was held that it was not, but was merely another mode of telling the atomy same story. The court said: "The damages sought are for the same injury allaged to have resulted from the defectiveness or insufficiency of the same machinery and that the existence of such defects was by reason of the default of the defendant." In Chicago City Railway Company v McMeen 206 Ill. 103, one of the principal questions arose upon demurrer to replications to pleas of the statute of limitations to an additional count filed after the statute had run. The court said that it might be true that the facts proved under the amondment were at variance with the allegations of the original declaration, and still it did not necessarily follow that the allegations of the amendment introduced an entirely new and distinct cause of action. This was illustrated in Various ways, and the court held that although the amenament varied the details in several respects, yet so long as the identity of the matter upon which the action was founded was

In the declaration which try Tairs, he promoted to part the stantial and if the sections is the training in the same if the section is the same alleged and any Stiriy in prestured or have corn proves at the same will not be arrested because of the shaped of the same as allegation of such material fact were its decembered that was section of such materials of the same its section.

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proserved, it did not state a new cause of action. The court there quoted with approval from Alabama Freat Southern Ry. Co. v Thomas, 89 Ala. 294 as follows:

"The various amendments allowed to the complaint do not, in our opinion, introduce a new cause of action different from that stated in the original count of the complaint. The grayamen of the action is an injury caused to twelve hea or cattle shipped by the plaintiff on the defendant's railroad on April 29, 1886, which injury was alleged to be the result of the defendant's negligence. The several amendments each make a case based on some alleged violation of duty growing out of the undertaking to ship these same cattle. They may correct a misdescription of the contract as to the agreed point of destination of the cattle, or otherwise cure an imperfect statement of the same subject matter, or add new averments of facts more clearly showing the negligence complained of or otherwise altering the grounds of recovery, or varying the alleged mode in which the defendant has violated his duties growing out of the agreement embraced in the bill of lading; but they so no farther. The identity of the matter upon which the suit is founded is fully preserved. The amendments all fall within the lie pendens proper, and only subserve the purpose of accomplishing substantial justice between the parties and of deciding the pending controversy on its real and true merits. This is the main design of all statutes allowing amendments to pleadings. The Statute of Limitations of one year was for these reasons no sufficient answer to the new counts added to the complaint by way of anendment." In L. S. & M. S. Ry.Co. v Enright, 207 Ill. 403, the trial court sustained a demurrer to the original acclaration, and to the

Same declaration as amended, and held it did not state a cause

in served, it ill not estate than or selled . The sound the equoted with approval from Misions Errors fouthorn By. . v Thomas, 83 Ma. 28e at Politab: is a single we missenger thought to the essential to rest, the on thing introduce a new oates of satisfical inforesty laws of all the standard court of the semplifier and the . A the action is amount of the action of the contract of the encrities at the continuity on the ladinal of the railings. THE RESERVE OF THE PARTY OF THE the Manager Division of American Hydrodian child THE RESERVE THE PERSON NAMED IN COLUMN TWO IS NOT THE OWNER. AND ADDRESS OF THE OWNER, WHEN THE PERSON NAMED IN COLUMN TWO IS NOT THE OWNER. AND ADDRESS OF THE OWNER, WHEN TH Ligander & Disease and the second s in the statement of the time adopted making, or add that

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of action. Another amended declaration was filed after the statute had run. To this the defendant pleaded the general issue and the Statute of Limitations. The court sustained a demurrer to the Statite of Limitations. This ruling was before the cause was tried by the jury, and so was before verdict. The court held that even though the declaration as first amended stated a cause of action defectively, yet it stated a good cause of action and would have been 'good after verdict; and that the second amended declaration did not introduce a new cause of action but re-stated more perfectly the same cause of action stated in the first amended declaration, and that though the facts concerning the duty of the defendant were, perhaps, imperfectly averred in said first amended declaration, yet they were but a defective statement of a cause of action and would have been good after verdict, and therefore the court properly sustained the demurrer to the plea of the Statute of himitations. In Hagan v Schleuter 236 Ill. 467, one of the questions discussed arose upon the ruling of the court in sustaining a demurrer to a plea of the Statute of Limitations to an amended declaration filed after the statute had run. This ruling was, therefore, before verdict. The original declaration averred the unsafe construction of a certain wall but aid not state in what respect it was unsafe. The amended declaration specified the articulars in which it was unsafe and set out in full a contract which was only referred to in ho original declaration, and contained averments as to the relations of the parties which had been emitted from the criginal declaration. It was held that the last amended declaration iid hot state a new cause of action, and that the cours did not err in sustaining a domurrer to the plea of the Statute of Limitations. Vogrin v American Steel & Wire Go. 261 Ill.

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474, is a recent application of similar principles where there was no verdict. There the court found in the language of the original declaration words which by reference were held to sufficiently admit of proof on the trial that at the time and place of the injury appellant was in the discharge of his duties as an employe of the appellee, although the charge was not made in language usually employed in common law pleadings for that purpose. It was held that the facts so found in the criginal declaration by implication and by reference, though not set out with the same parthicularity that they were in the amended declaration, authorized the filing of said amended declaration, and that the latter in no manner changed the ground on which appellant had originally predicated his cause of action. It therefore seems to be an established rule of pleading that though the question whether the dause of action stated in an amended declaration filed after the statute has run is the same cause of action as is stated in the original declaration usually arises after verdict, and it is usually said that the declaration is good after verdict; yet, where there has been no demurrer to the declaration and the question arises upon the pleadings before verdict, an amended declaration or an additional count filed after the statute has run will be held to only restate a good cause of action defectively stated in the original declaration, if the necessary allegations may be fairly and reasonably inferred or may reasonably be found to be implied in what is said in the original declaration.

The original declaration in the case at bar sufficiently (alleged the location of this building in the City of Streater; that it had a stairway on the outside; that a polled owned the building at the time of the injury; that the stairway was

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To wes hold that the factors of fours in the criginal from by implication and by reference, though not out the common feathfulantly that they were in the common action, anthonises the filling of said amended decimantion.

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defective, rotten and unsafe; that app fell through it enforcemen and was injured; and that appel lee had made a contract with that the original declaration did not even defectively state a good cause of action because it did not set out facts which made it a duly point it awar again that it work we stairway in repair, and because it did to the that sellant had any right to be upon that stairway whon she was injured. The second count of the original declaration alloged that on or entored 1 to an agreement .)th Samuel Jacobson, the husband of to keep the roof, stairway and outer walls of said building in good repair and condition. That count did not say in express terms A that this agreement was in writing, but it said that a certain matter therein was "in words and figures as follows", which plainty inalled that it we not a verbal but a rritten arrecord illichthe pleader ro erred. At one place that count is ties that the art quoted therein from the agreement is the entire agreement, but it is fairly inferred later that it was not the entire agreement, because that count average our ice underteak to keep and stairway in good repair and condition until June 15, 1915, which is not contained in what in quoted from the agreement. Said speed count, therefore, alleges an agreement batween appelled and the husband of appellant to keep the stairway in good repair and condition, and that said agreement was in force at the time she was injured, and it plainly indicates that the agreement ix writing was in writing and that only a part thereof was set out in that count. We are of the cpinion that an amended declaration or an additional count, stating more fully the nature of said agreement, and explaining more fully why appellant was on said stairway, would not be the stating of a new cause of action, but would be stating what

age idea had mad a nonvented at the 13435177 actingua et al materia. It is arguera ture tedentation lik not sweet actrovition, and adount ကိုမှုပ (၈၈၀ ရှိမှန် သနိုင်) ရှိန်းကိုင်းနှင့်ကွင့်ပ print to the same married toulist, a taux mode 'gue'ils the course of bysi ALTONIA OF THE TAXABLE -assidat son geforde parriere indo from of od thirty The second court of the contraction of the second court of the court o .0001, 35, 1910, musi Theospan, if a number of least least Tribe on. East count did not say in express topas , that ifits nt was in writing, but it said that a corbola cathor in was "in words and figures as follows", restainment acos ai gamminda rino godi do hoogacha elilla e end condition until June 16, 1916; thich day not conceined

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might be reasonably inferred from what was arleged in card second count.

It would not be implied that an exterior stairway was put on as an ornament to the building, but rather that it was there for use and for the use of appellant's husband and to enable persons who had the right to do so to pass between an upper story and the street. It would be presumed that appellant to husband had an object in requiring that the stairway should be kept in good repair, and that it was / intended by the contract that he should use it in some way connected with his home or his business. With exceptions not Applicable here, a wife has the natural right to go where for husband lawfully is. A some-What analogous principle | lits in a lit - Table, in it. 277, and Kennedy v Kennedy, 87 L11. 259. To state the occasion of her being on the stairway more fully would only be enlarging the particulars of that which is fairly inferable from said second count and fairly implied the min. The additional count and out U. a untravent in Bull, (warman (in the state of in Hagan v Schleuter, supra.) and it therefore appeared that the agreement mentioned in the second count was a written lease annellant husband, to be of said building from an uved only as a store building and a flat for living rooms, and was to so re-model the building that the upper ficor should have suitable apartments for flat purposes. The proof was that the upper story was so re-modeled, and that at the time of the accident to Assellant, Samuel Jacobson and his family lived in the upper rooms, and that this stairway was their means of access to the street, and that there with her husband, and that she was passing between the street and their living rooms when this board of the otdir way gave way beneath her and caused the injury. The pallitional count melazion for the same injury to the amiliant, received upon the same stairway of the same building, by reason of the same defect, and only amplified and enlarges that which is fairly

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reserve to the parties, we appropriate the end of the second sections and the second sections are the section section sections are the section sections are the section sections are the section sections are the section section sections are the section sections are the section sections are runtily thistide page controller to be inferred from what is said in the second count. We are of opinion that these were permissible enlargements and fuller statements of that which was imperfectly alleged in the second count, and that the Statute of Limitations was not a defense thereto.

A ppellee however contends that if said stairway was out of repair, it was only a breach of a covenant in the lease, and that the only action to which he would be liable would be in covenant for a breach thereof, and therefore no cause of action is stated even in the additional count. Whatever may be the rule in other jurisdictions, we think it clear from Sumasack v Morey 196 Ill. 569, and Borggard v Gale, 205 Ill. 511, that in this state, if a landlord has covenanted to keep the premises in repair, or has known and concealed defects therein from the tenant, and because of a failure to keep the premises in repair or because of the defects so concealed, either the tenant or anky any member of his family is injured, or any other person lawfully upon said premises for business or pleasure is injured, such person would be entitled to recover against the landlord for said injuries in an action on the case. In Borggard v Gale, supra, the wife of the tenant was the plaintiff, and though she failed to recover, it was only because of the insufficiency of the evidence.

We therefore conclude that the court erred in overruling the demurrer to the plea of the Statute of Limitations to the additional count, and erred in refusing to admit the lease in evidence, and erred in directing a verdict for appellee. The judgment is therefore reversed and the cause remanded for further proceedings in conformity with this opinion.

Rexxar: Reversed and romanded.

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two arr qualitie bist li that the objection is vewel salleer t r, it was only a crosest of a covernant in the cause, and ns ed bloom sldett ed tiper ed tolde et molton you e for a broadle thereat, and therefore no cause of action even in the will figure count. Thatever may be the mule vero: v somesmuš mori teste ti žinias sa pomeireliteltuj LET I 1. 180, and Forggara v Cale, Alb III. Bil. that in this . if a lamilari has coveranted to keep the premises in This American endealed authory carried the the Standard of telegraphic fields and the commence of an dament of the weather of democratical sittle of the transmit of abor of his family is injured, or my other cores ... v... co archana end tenings reverse of heitirus ou minow most a injuries in an retion on the case. In Portrar v in, the rife of the temant was the ridintial, and thrugh I sat to secover, it was only because of the inel fictency

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5 T.	ATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
The contract of the contract o	rt, in and for said Second District of the State of Illinois, and keeper of the Records
ind	Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said	Appellate Court in the above entitled cause, of record in my office.
	IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
	seal of the said Appellate Court, at Ottawa, this
	day ofin the year of our Lord one

thousand nine hundred and____



61.2

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand rine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS Justice.

CHRISTOPHER C. DUFFY, Clerk 200 I.A. 100

E. M. DAVIS, Sheriff.

PHDru 74-1.1916

BE IT REMEMBERED, that afterwards, to-wit: on

DEC 271915 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6143. James B. Padan,

Defendant in error.

Error to LaSalle.

The Chicago, Rock Island and Pacific Railway Company,

Plaintiff in error.

Carnes, J.

James R. Paden, plaintiff below, was a teamster, and unloading coal from a cer that had been placed on a side track by the Chiago, Rock Island & Pacific Railway Company, the defendant below, and while so engaged a switching crow of the defendant shoved another car assinst the one from which the plaintiff was taking coal with such force as to throw him to the ground and injure him. This suit was brought to recover for such injury. A jury trial resulted in a judgment for 1100.00 from which this writ of ergor is prosecuted.

It is contended that the declaration does not even defectively state a cause of action and that defendant's rotion in arrest of judgment should have been sustained. This is the principal question in the case, the contention main that it does not appear that plaintiff was rightfully at the place where he received his injury, and therefore the defendant over him no duty except not to wilfully injure him. / The declaration so far as it relates to this question, our so that the defendant in the use and operation of its railroad had a team or were andise track connected with ite road in the Village of DePue, in the County of LaSalle, which track was used by the defendant in placing care thereon containing freight, so that parties entitled thereto might be enabled to unlead said freight from said cars, or load freight into the cars; that on January

Gen. No. 6143. James B. Padan,

Defendant in error.

Error to LaSalle,

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The Chicago, Rock Island and Pacific Hailway Company,

Plaintiff in error.

Carnes, J.

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unloading coal from a car that had been placed on a side track
by the Chargo, Hool stand and the Chargo, and while so engaged a switching erew of the
defendant shoved another car against the one from which the
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defectively state a cause of action and that defendant's motion in arrest of judgment should have been sustained. This is the principal question in the case, the contention being that it does not appear that plaintiff was rightfully at the piace where he received his injury, and therefore the defendant oved him no duty example in the court of the relief that the defendant of sociar at rile; to relief that the demand in the use and operation of its relirons had a team or merchandise track connected with its road in the Village of DePue, in the County of LaSalle, which track was used by the defendant in placing care thereon containing freight, so that

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12, 1914, the plaintiff was engaged in unloading certain freight from one of the cars so used and operated by the defendant while said car was standing upon the said merchandisa track.

Then follows allegations that the defendant, without warning etc. drove another ear, etc.

It is said that the declaration might be true, and yet the plaintiff might be a trespasser. This is true, and the declaration would probably, for that reason, have been held bad on demurrer. But the question here is whether it is good after verdict. A similar declaration was before the court in Seibert v Vandalia R. Co. 179 Ill. App. 617. and the came contention there denied. There was an averment in the declaration in that case that the plaintiff was engaged in unloading freight from the car into the wagon, and had been so engaged all the day before the injury complained of and on the day of the injury up to two o'clock in the afternoon. Those averments left the declaration less open to attack than is the declaration in the instant case, which contain no allegation as to the Length of time the car had been there, or the plaintiff had been at work there, and there is much force in the defendant's argument that the declaration, considered under the rules announced in Mackey v Northern Milling Co. 210 Ill. 115, and McAndrews v C. L. S. & E. Ry. Co. 222 Ill. 232 does not even defectively atate a cause of action. Our attention is also called to our own decision in Vogrin v American Steel & Wire Co. 179 I.1. Appl. 245, where we endeavored to apply the rule announced in

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App. 24E, where we emeavored to sapply the rule announced in those two cases and erred in the effort so to do, as appears from the decision of the supreme court in 263 Ill. 475. We are inclined to the opinion that the rule announced in the Mackey and McAndrews cases thould not be exterded farther than is required by those tocisions, and that it should not be applied to this case. We do not see how the lack of averment that the plaintiff was lawfully engaged in removing merchandise from the car can be held a more serious defect than would have been a failure to aver that he was at the time in the exercise of due care for his own safety, and the court held in B. & O. S. W. Ry. Co . Then 159 Ill. 535, the failure to aver due care was cure. by verdict, and used the following language:- "Where there le any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objectsion on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so imperfectly or defectively stated or omitted. and without whichit is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by verdict. 1 Chitty's Pleading (14th. Am. ed.) 675; Illinois Central Railroad Co. v Simmons, 38 Ill. 248; Atchison, Topeka and Santa Fe Railroad Co. v Feehan, 149 id. 202. In the case at bar it is not to be presumed the jury would have given the verdict, or that the court wall have sustained it, without evidence tending at least to establish the fact of due care on the part of the doceased. The

The Illinois authorities on this subject are collected and reviewed in Jacobson v Ramey. Gen. No. 6076

"motion in arrest was properly overruled,"

App. 245, there we ething ored to mapply be rule attinutere in those two cases and erred in the effort so to do, as prears from the decision of the supreme court in 265 Ill. 475. C. We are inclined to the opinion that the rule announced in the Makey and Johnnaown names migulo not of extended farther than is required by those decisions, and that it should not be applied to this case. We do not poe how the lack of averment that the plaintiff was lawfully bied ed nes can be from the car can be held a more serious defect than would have been a failure to aver that he was at the time in the exercise of due care for his own safety, and the court held in B. & O. S. W. Ry. Co. Then 159 III. 535, the failure to aver due care was curta oy verdict; and used the following language:- "Where there is any defect, imperfection or oniceion in any pleading, whether in substance or in form, which would have been a fatal objectation on demurrer, yet if the issue joined be buch as messentily required, on the buch, proud or the facts so imperfoctly or defectively stated or onitted. and without whichit is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verd et, such defect, imperfection or omission is cured by verdict, 1 Chitty's Pleading (14th, Am. ed.) 875; Illinois Gentral A.Altonul do. . St wome, Atchieon, Topeka and Sunta Fe Railroad Co. v Feehan, 149 1d. 202. In the case at bar it is not to be presumed How truce edt tent to toibrev oth nevin evan bloow grut ent have sustained it, without evidence tending at least to setablish the fact of due care on the part of the deceased. Me "motion in arrest was properly overruled."

The Illinois authorities on this subject are col-

--- Ill. App. ----.

We think the declaration must be held good after verdict. therefore the court did not err in overruling the motion in arrest of judgment.

The gist of the charge in the declaration of the defendant's negligence is that it pushed the car upon the one which the plaintiff was unloading without giving him warning. While there is some conflict in the evidence, it abundantly systains the declaration in that respect and it is not seriously contended that it does not. There is no contention, or ground for contention, that the verdict is excessive if the jury were warranted in believing the plaintiff's evidence as to the extent of his injuries, and we think they were warranted in so doing. No error is argued as to the rulings of the court on the admission of evidence. The only instruction given at the instance of plaintiff was on the measure of damages. The injury claimed was an aggrava tion of a hernia, from which the plaintiff had been sometime suffering, and there was evidence before the jury as to a surgical operation performed on plaintiff after the time in question, and a fair question was precented as to how rech of the disability under which plaintiff was buffering resulted from the accident. The instruction complained of informal the jury that if they found the defendant guilty in assessing damages "they should take into consideration all the facts and circumstances shown by the evidence before them; the nature and extent of the plaintiff's physical injuries, if any, so far as the same are alleged in the declaration and shown by the evidence. " | IV is us an that under the evidence in this case which retired the inttion by the jury between the disability resulting from the accident and charged in the declaration, and disability

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To think the localization within a larger and portion the reference the court did not err in overruling the motion is arrest of judgment.

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inttion by the jury between the disability and in

that did not result from the accident, it is likely that the jury were misled and acted on the belief that damages could be assessed for the disability regardless of it; source We do not understand counsel to contend that the instruction would be bad except upon his peculiar condition of the recert. It is true that in cases where the plaintiff is suffering disability that may have arisen only in part from the injury complained of, instructions as to the measure of damages that might otherwise be good should be carefully guarded and the jury clearly informed that damages can only be based on the injury/complained of. This \instruction referred the jury to the declaration and limited the injuries to those there charged, and The court, at the instance of he defendant, cory slearly and forcibly instructed the jury that the damages must be confined to such as are the natural proximate result of the defendant's neglect; that the burden of proof was on the plaintiff to show his injuries were caused by the defendant's neglect; and if they believed that the injuries from which plaintiff complained resulted from other causes than the defendant's cagazar negligence that the complainant could not recover anything for injuries and specifically told them if they found from the evidence that the condition of the plaintiff's rupture which necessitated the cperation he underwent did not result from the accident of which he complains as a natural and proximate consequence, but was a condition in no way connected therewith, then in determining what his damages were they should leave out of consideration the fact of the operation, the time lost thereby, and the expense paid and suffering connected therewith. We think that the instruction was one that could be properly given in or Mnary cases, but that it needed qualifying under the facts in this case, and that the other instructions before mentioned fully served that purpose.

that did not result from the nocilent, it is limit that jury were imisled -and acted on the belief that damages could be reseased for the disability reguraless of it au rus We do not undertand counsel to contrad that the initiality would be bad except upon his popular on allow of bound. It is true that in cases where the plaintiff is suffering disability' that may have arisen only in part from the injury complained of, instructions as to the measure of damages that might otherwise be good should be carefully guarded and the jury clearly informed that damages can only be based on the injury complained of. This instruction referred the jury to the declaration and limited the injuries to those there courgod, and the court, at the dividence of the defendant, some claurly and derially instructed the jury that the damages must be confined to such as are the natural proximate result of the defendant's neglect; that the burden of proof was on the plaintiff to show his injuries were caused by the defermant's maginety und it may believed belluser inpution in this plant of the complete of their from other causes than the defendant's orghest negligence ... that live complainant could not recover anything for injuries and specifically told them if they found from the evidence. that the condition of the article of the mothings and think espitated the eperation he unburent in not rought from him signification and article and article and province and province consequence; but was a condition in no way connected thereblueds your energy what his damages were they with ent inoitareno out to tent out moitarebienos to two senel time float, thereby, and the expense paid and suffering conthat the interest that the interest better that beboon it tody tud agent in an an arriver of blues redto eit; tadt bac jeses shif at storl af raban natylilan

The sixe of the verdict indicates that the jury were not misled in that respect. Finding no error in the record the judgment is affirmed.

Affirmed.

uid net result fign the sect ont, it is list; it is not the gray were not marked in that the jury were not mirled in that respect. Finding to error in the record the judgment is affirmed.

Affired.

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STATE OF ILLINOIS, ass. I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk. 200 I.A. I 0 4

E. M. DAVIS. Sheriff.

PHARM Feb 1/15

BE IT REMEMBERED, that afterwards, to-wit: on

DEC 271915 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6921.

Joseph H. Paxton, et al. appellees

VS

Appeal from Lake.

William H. Fabry, et al appellants. S

defendant Carnes, J. Sometime prior to August 1914, appellant Bradford E. Simmons, was the owner of a store building and lot on which it was located, in Zion City, Lake County, Illinois, and the other appollants, William H. Fabry and M. F. Ellis were using a part of it under a lease from Siemons, as a drug store in which they also sold cigars. A resident physician had an office in the b ilding. On May 3rd. 1915, after this condition had existed for none months or more, mellees, fourteen lessees of residence properties in the City of Zion, filed a bill for injunction to restrain such use of said building, and applied to the court for an interlo cutory decree enjoining such use pending the liti ation. The application was heard on the bill and affidavits in support thereof, and affidavits of the defendants who appeared and without answering the bill, resisted the application. A decree was entered restraining the defendants, until the further order of the court, from using any part of said premises as a cimarette, cimar or tobacco store; or a place for the manufacture or sale of to bacco in any form or manner; or pharmacy, apothecary shop, or drug store; or & place for the manufacture of sale of drugs or medicines of any kind; or the office or residence of a practicing physician, surgeon, or other person actually engaged in the massile : 1 The defendants prosecute this appear, medicine or surgery. and the question here is whether the trial court was available "thin its sound judicial discretion under established le al principles in granting the preliminary injunction.

Gen. No. 6021,

Joseph H. Paxton, et al. appellees

Appeal from Lake.

BV

William H. Fabry, et al appellants. S

Carmes, J.

Sometime prior to Auguet 1914, Appellant Pradford I. Simmons, was the owner of a store initiating and lot un which it was located, in Sion City, Lake County, Illinois, and the other appellents, filliam H. Fabry and M. F. Fills were erors and a second Broad search a return it to frag a gains in which they also nold of mrs. A resident physician had an office in the building. On Vay 3rd, 1915, after this condition had extered for mone months or nore, spelless, fourteen lesenes of residence preparties in the City of Mion, filed a bill for injunction to restrain numbers to be in the season of notes and injunctions eau dour andinione served victuo plastit as rol france soft of pending the litt stion. The application was heard on the bill and affidavite in support thereof, and affidavite of the defendants who appared not ithout answering the bill, real stud the application. A decree was entered westraining the serants, until the further order of the court, from using any (elors condito In repla , esten in a message bine lo fraq or a place for the manufacture or sale of to hadde in any lura or manner; or pharmacy, apothecary shop, or drug stare; or s place for the manufacture of sale of drugs or meditines of any kind; or the office or residence of a practicing physician, surgeon, or other person soins ly angeled in the propies of medicine or surery, The defendants prosonus this appoint, and the question here is shether the trial court was soling within its sound judicial diècration under established la al

The affidavits read on the hearing are incorporated in the record, certified by the clerk of the court. There is no certificate of evidence, therefore we assume that we cannot take notice of their contents. (Lange v Heyer, 193 Ill. 420; Weatley v Mracek and Cettert, 180 Ill. App. 648.) We will assume for the purpose of this decision that the court on a consideration of the bill and all the affidavite filed, was warranted in finding that the a letations of fact found in the bill were true. The theory of the bill is that John Alex. Dowie, in his lifetime, prior to 1899, organized a religious sect opposed to the business and practices sought to be enjoined, and various other forms of business regarded legitimate and proper in civilized comunities, and still other practices that are generally condemned as immoral and illegal; that in 1899 the site of Zion City was selected as the location of the society in which such business and practices should be promibited; that in furtherance of that purpose Dowle obtained title to nearly all the land within the present city limits and executed leases for the term of 1100 years containing restrictive covonants against said uses; that a building plan was also adopted to that end, and various statements were publicly made and published by Dowie proclaiming such purpose; that afterwards Dowie became insolvent and with his property, including a lar s postion of the land within the limits of Zion City, passed into The hands of a receiver under the control of a federal court, the receiver made sales of the property in various ways and under various restrictions that resulted in maintaining such restrictions as to all land sold: that the result of tosse facts 48 that the owners of land in the City of I on holding by or under titles containing such restrictive covenants are bound by the covenants, and also that the owners of land

The affidavite read on the hearing are incorporated in the record, certified by the clerk of the court. There is no certificate of evidence, therefore we assume that we take notice of their contents. (Lange " Royer, 135 Ill. 430; Wheatley v Mracek and Gettert, 160 Ill. App. 646.) Tago and increase of the purpose of the second and for the open on a consideration of the bill and all the affidavite filed, was warranted in finding that the A Legations of fact lound in the bill were true. The theory of the bill as a st John Alex. Dowie, in his lifetire, prior to 1899, organised a religious sectorate business and precipes action of besong of the security enfolmed, and various other forms of business reproded legislates sections in civilized on munities, and still other practices that are generally condemned as it moral and illegal; that in 1802 the site of Zion City was selected as the logiston or the society in anich such business and practices anould be prohibited; of sitts tentario et all section is a le somerantiul at is. nearly all the land within the present city limits on encoured lease for the true countrining rear oddl to med add tol seesal enants against said uses; that a bid seas as as said to that end, and various state ears were publicly ande nd published by Dowle propletwing and purpose; thut after and Dowle became insolvent and with mis property, including a lar s portion of the land within the limits of Alon City, passed into ine court, and a receiver under the control of a lederal court, the receiver made andea of the property an surface and nous paintintes at soldier that another avoitar Tabau restrictions as to all land sold; what the remail of these rects is that the owners of land in the dity of I ca builting by or under titles containing such restrictive covenance are roun. by the covenants, and also that the owners of land, there situated

holding under titles in which there are no restrictive covemants are also bound if they purchased with knowledge of the plan upon which the said city was founded, Appellees able counsel required two bundred pages of typewriting to set forth in the bill the matters relied on by them to support their right to an injunction. Very full, exhaustive briefs and argusents are presented here by counsel for both sides on the legal effect of the allegations in the bill. The briefs are for the most part devoted to questions that must be determined by a court on the final hearing of the cause calling for an investigation of the merits of the case that is not undertaken by either trial or reviewing courts in determining the propriety of a preliminary injunction. It is urged in the arguments that atter of public interest concerning the title to much property is involved, which is manifestly true, and such questions might better be left to the final hearing and be decided in a proceeding where the decree of the trial court can reach The supreme court for review that pronciples may be announced that can be acted upon as rules of property. Any decision that we may render, or view that we may express has no dinding effect on persons or property not included in this suit, and there is no appeal from this court in this case. There seems to be a mearth of authority in this state on some of the questions here involved, yet we think the principles are well established and so tled on the authority of t e text books on the subject, and decisions of other states. Our supreme court in People V Grand Trunk Ry. Co. 338 Ill. 398, quoting from a former same sid, speaking of the remedy by injunction: "The tendency was a to be to greatly abuse it. " The appellate sourt of the first cistrict in Young v Federal Union Surety Co. 145 Ill. Ap. 371, cited Beach on Injunctions, Sec. 110 and High on Injunctions,

Sec. 13, on the proposition that the merits of the class are not

holding under titles in which there are no restrictive covemants are also bound if they purchased with knowledge of the plan upon which the said city was founded. Appellees! able counsel regulared inclundred page of typewel in trough to the it is a state of the believe restrict of the or the or their right to an injunction. Tery full, exhaustive buters and argusents are preparted and to council for both sides on the legal effect of the mile attend in the bill. The briefs are bediete ab of some suns anolitecup of betoveb tran som ent ref by a court on the first bearing of the cause calling for an mela, welco for al fait weap erf lo athrewent lo colingifaced by sither trial or revision courts in determining the project of a preliminary injunction. It is organized in the arguments that a matter of public interest concerning the title to much property is involved, which is tailersly true, and such questions might bestook of the national heart of thei ad tested sagin proceeding where the learne of the trial court one reads the supreme court for review that premainles may be annumend that can be acted woon or rules of property. Any designed white we may render, or view that we may emerene had no wholln entect on persons or property not included in this suit, and there is no appeal from thin nours in this came. There we un vo te a dearth of authority in this state on some of the questions mare involved, yet we think the principles are well setablished out sattled on the authority of the text books on the author, T digos of Price one representation to anotales bas Grand Trunk Ry. Co. 232 Ill. 703, quoting rom a former same said, speaking of the resear by injunction: "the tradency sects really sold to truop esalingum ent ". it easeds gifaery of ed of district in Young v Federal Union oversy Co. 181 Ill. App. A::, cited Beach on Injunctions, Far. 110 and High on Injunctions,

pas ed on in considering a preliminary injunction, but the court should inquire whether less harm will result to the enjoined party if he should be finally victorious than would accrue to the complainant from the absence of the injunction if he were a winning party, and quoted from Russell v Farley 105 U.S. 433:

"It is a settled rule of the court of chancery in actions on applications for injunctions, to regard the comparative injury which would be sustained by the defendant if an injunction were granted, and by the complainant if it were refused.

(Kerr on Injunctions, 309, 310) And if the legal right is doubtful either in point of law or fact, the court is always reductant to take a course which may result in material injury to either party."

And from the City of Newton v Levis, 25 CCA 161:-

"When the questions to 'e ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable and may well be indemnified by proper bond if the injunction is granted."

It is said in A. & E. Fnc. of Law, Vol. 16, page 346, a preliminary injunction may sometimes be properly refused upon the same facts which would entitled the party of right to an injunction on final hearing. It is said in 32 Cyc. page 750 the object of a preliminary injunction is "To maintain the shatus quot to maintain property in its existing condition; to prevent further or impending injury - not to determine the right itself."

On page 741- "It will not be granted where it is not apparent that any injury at all will occur."

"It is a settled rule of the court of chancery in actions on applications for injunctions, to repard the sommarative injury which would be sustained by the defendant if an injunction were granted, and by the completent if it were refused.

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object of a preliminary injunction is "To maintain the casus
quo; to maintain property in its saidsing con itlen; to prevent
further or immending injury - not to determine the right ine If."

Andon page 749 - "Great caution is to be used in issuing mandatory injunctions. * * * * * * The complainant must make out a clear case free from doubt and dispute."

On page 751 p The issuance of a temporary infunction to maintain the status quo depends chiefly upon the relative inconvenience to be caused the parties.

And on page 753; "The right asserted by complainant, however mustbe perfectly clear and ffee from doubt where the effect of a preliminary injunction will be more than merely the maintenance of the status quo, or where the injunction will cause defendant greater loss and inconvenience than that which will be suffered by the complainant in the absence of an injunction. In any event, an injunction must be refused * * * * if he (Complainant) does not make it appear reasonably probable that an irreparable injury is impending and will occur before the final hearing can be had."

On page 756; "When the question of Taw is one of the chief issues to be determined on the final hearing, and complete relief can be then afforded, the complainant is not entitled to the preliminary injunction. An injunction will not be granted where there is grave doubt as to its propriety or necessity."

On page 763, "A preliminary injunction will not, as a general rule, be granted in cases where it is not shown that any irreparable injury is immediately impending and will be visited upon complainant before the case can be prought to a final hearing."

The above quotations from the text of Cyc are most of them supported by a great number of citations, generally from the reports of other states and the federal courts. The author, however, does not note any decision of this state in conflict with the general principles that he announces. A reference

Andon page 740 - "Great sout on in the need in inviting encdatory injunctions." * The complicant need of the out of the sound of the front found that dispute."

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On page 751 p The insurance of a temporary injunction to mainthin the status que depands chiefly upon the relative inconventance to be caused the parties.

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On page 757; "When the question of law is one of the chief issues to be described on a time, hearing, and complete relief can be then efforted, the positionary injunction, in injunction and the preliminary injunction. In injunction the negligible of near site, where there is grave doubt as to its propriety or near sity.

On page 763, "A prelimitary injunction it is not, a near sity rule, be granted in cases where it is not shown that any irreparable injury a series in inpunding and LLI be visited about complaints before one one or another that any apon complaints before one one or another or intelligent the carrier."

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to the volumes of "Annotations of Cyc" showing decisions on these various points since the publication of the volume from which we have quoted, discloses that most of these principles have since that time been restated or recognized again and again by our federal and state courts. This opinion might be extended to great length by citing and discussing those cases.

In the late case of McMillan v Kuehnle, 78 N. J. Eq. 351, the court considered an application for a temporary injunction by owners of dwelling houses near a baseball park to restrain holding baseball games there on Sunday, the bill charging that crowds attending the game, by noise and confusion, disturbed the peace and quiet of the neighborhood, and held them not entitled to the writ. The court said.

"Such a writ ought never to be ordered unless from the pressure of an urgent necessity. The damage which it is legitimate to prevent during the pendency of a suit must be in an equitable point of view of an irreparable character". (Citing authorities) and quoting from an earlier authority — "It is impossible to emphasize too stringly the rule so often enforced by this court that a preliminary injunction will not be allowed when the injury which may result from the invasion of the complainant's right is not irreparable." and added — That the injury complained of could not be zanzzzzań considered as an irreparable mischief and that if it be conceded that the disturbance is of such a character as to entitle complainants to an injunction on a final hearing of the cause, still it is not so substantial as to warrant the issuing of a temporary writ.

In Meter v Somerville Water Co. 79 N. J. Eq. 613, the court said
"The object of a preliminary injunction is to prevent some
threatening irreparable injury pending a full and deliberate
investigation of the case upon the merits. It will not be ordered
unless from the pressure of an urgent necessity and mare the
damage threatened during the pendency of the suit is of an

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In the late case of McMillan v Kuehnle, 78 N. J. Eq. 251, the court considered an application for a temporary injunction by conera of dwelling houses near a meschall park to restrain holding baseball games there on Sunday, the birt cuarraing that crowds attending the game, by noise and confusion, teamed the peace and quiet of the neighborhood, and held them not entitled to the writ. The court said...

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In Meger v Somerville Unter Co. 78 N. J. Iq. dlb, the court said

irreparable character." (Citing authorities)

In the case of Blanchard v Fastern Pennsylvania Power Co. 80 N. J. Eq. 10, it is held if the complainants case rests on & legal right which is not clear and has beenfairly questioned then a preliminary injunction cannot be granted. (Citing autho rities) In Fredericks v Huber, 180 Penn. St. 573. the court, in holding a preliminary injunction, restraining the use of a church improperly granted, said that its effect was practically to reverse the whole status of the parties, and added - "This is not the office of a preliminary injunction, which is not to subvert but to maintain the existing status until the merits of the controvery can be fully heard and determined." And adds - "That the status quo which will be preserved by preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy." In Snod grass v McDanielk. 144 Iowa, 674, the court applied the rule that the purpose of a temporary injunction is to preserve the status quo of the parties and not to obtain affirmative relief in advance of the trial.

The find in Richards v Meissner 158 Fed. Rep. 109, the following language in relation to granting a preliminary injunction—
"While it does not finally determine the rights of the parties to the action, and is intended only to preserve the existing status until the case can be fully heard, and therefore is it is not necessary that the court should, before granting it, be satisfied that the complainant will certainly prevail upon the final hearing of the case, the court should, nevertheless, be careful that the complainant has a probable right, and that there is probable danger that such right will be defeated without the special interposition of the court. It is equally true that where, on the showing made at the preliminaryhearing,

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irreparable character. * (Citing authoraties)

In the case of Manchard v Tastern Pennsylvania Power Co. 80

M. J. Eq. 10, it is held if the complainants case reass on a legal right which is not clear and has been sirly questioned then a preliminary injunction cannot be granted. (Civing audustities) in Fredericks v Muter, 160 Pann. St. 578. The court, in holding a preliminary injunction, restraining the use of the church impresently granted, said that the effect and racinally to reverse the whole status of the partice, and dade - "lair is not the office of a preliminary injunction, which is not to subvert but to maintain the existing status until the means."

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In Smod reas a Molenieli, 144 Icms, 676, the scurt applies to rule that the purpose of the parties and not to obtain affirmative relief in advance of the trial.

We find in Richards v Versener 158 Fed. Rep. 108, the following them:

Language in relation to granting a preliminary intunction
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to the setion, and is intended only to preserve the salistic status on the setion, and is intended only to preserve the existing status until the case can be fully ceard, and therefore it is not necessary that the completent will certainly around the satisfied that the completent will certainly agreeine, be fired that the completent age a module, agreeine, be careful that the completent age a module sight and that the completent age a module sight and that the completent age a module sight all the special interposition of the court. It is equally true that where, on the showing saids at as productions.

the law as to the right to an injunction is quite doubtful and that as much, if not more, injury would probably ensue to the defendants than to the complainants, and especially where in the event of the bill being dismissed on final hearing, there is grave doubt of an adequate redress to the defendant resulting from the injunction, the court should refuse the application for a temporary injunction, and await action until all the facts appear on final hearing."

The principles announced in the coregoing authori lesages seem reasonable, and we think they might be taken as a guide by courts of this state in passing on motions for temporary injunctions. Even on final saring our supreme court has said in Hill v Kimball, 369 Ill. 398:- "In cases where mandatory injunctions are asked for, it is the duty of the court to consider the inconvenience and damage that will result to the defendant as well as the benefit to accrue to the complainant by the granting of the write, and where the defendant's dalages and injuries will be greater by granting the writ than will be the complainant's benefit by granting the writ, or greater than will be complainants damages by the refusal of it, the court will, in the exercise of a sound discretion, refuse the writ. " (Lloyd v Catlin Coal Co. 210 Ill. 460; Dunn v Youmans, 224 id. 34; 1 High onInjunctions, 4th. Ed. sec. 2. and cases cited.) Applying those rules to this case we are unable to see any valid reason for the decree. If we assume that the complainants will, on final hearing, be entitled to an injunction, still the maintaining of the ordinary drug store and physician's office in the City of Zion during the pendency of the suit was not such a threatened mischief and injury as should be held irreparable in passing on a motion for a temporary injunction. The restraining order did not issue to maintain the status quo, but was in the

the law as to the right to an injunction is quite coultful and that as much, if not more, injury puld frobing anerthe derivation that the sound dismissed on final hearing, in the event of the bill being dismissed on final hearing.

There is grave doubt of an adequate reduces to the court about from the injunction, the court about salues the application for a tenterary injunction, and coult aciden

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nature of a mandatory injunction granting the relief sought by the bill in advance of a hearing on the merits, and therefore such as will not ordinarily be granted. There is grave acubt about the law upon which the complainants! right to ultimate relief rests, Many questions arise as to the legal effect of various facts averred in the bill, and whether a sound consideration of public policy will permit the enforcement of the restrictive covenants relied on: can only be known after a final devision of a court of last resort; and finally, the injury and midbhief inflicted by a wrong ful issuing if the writ suspending an established business during the pendency of the suit is one that cannot be adequately compensated in damages, and therefore the defendants could not be adequately protected by the bond required, while the injury that would be statained by the complainants in wrong fully refusing the writ is of little importance.

We are of opinion that the writ should not have issued and that the trial court was not acting within its sound judicial discretion in entering the decree awarding it, therefore the decree should be reversed.

Reversed.

nature of a mandatory injunction granting the ralled sought by the bill in advance of a hearing on the mente, in I therefore such as will not or dannily is granted. Were in craye acubt about the law upon which the complitation that to ultimate relief rects, Many adentions arise as the Louis effect of votions facts werend in the bill, and whether a sound consideration of public policy will considering onforcement of the rectricitive devenuer rathed on one only be known after a final deviation of a court of last a resert; and finally, the injury and mindhief inflicted by a greatful idening if the with suspending an established business during the pendency of the suit is one that connet be angequately compensated in damages, and therefore the defougants could not be adequately proteuted by the bond required, while the injury that would be adetrianed by the complements in wrongfully refusing the writ is of little importance.

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Reversed.

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STATE OF ILLINOIS, second district. state of the Appellate I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
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thousand nine hundred and

Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present -- The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

BE IT REMEMBERED, that afterwards, to-wit: on

FFR 8 191 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6144.

Christine L. Palm, appellant.

PVV

Appeal from Winnebago.

Rockford City Traction Company, appeller.

Dibell, P. J.

On the 27th. day of January, 1913, at the corner of Second Avenue and Seventh Sirset, in the city of Rockford in Winnebago County, Christine L. Palm fall from the step of a car operated by the Rockford City Traction Company and received injuries, for which she brought this suit to recover damages. She filed a declaration, to which there was a pleatof the general issue. Later she obtained leave to file, and did file, four additional counts, to which there was also a pasa of the general issue. At the trial at the January term 1915, of the dirouit court of that County, leave was given the plaintiff to amend her declaration, which she did, by alleging that the conductor of the street car negligently permitted the exit door of the car to remain onen while the car was in motion, which induced the plaintiff to believe that she could safely alight and in doing so she was injured because the car had not been stooped. The Wefendant demunred to the amendment but the demurrer was overruled and the prea of the general issue formerly made to the original declaration, was ordered to stand as the plea to the amended count. At the close of the the cvidence the court instructed the jury to raturn a verdict for the defendant, which was done; a motion for a Ma trial was overrused and the defendant had judgment against the plaintiff, from which Pills Lar deals a poulse

The car in question was of the "Pay-as-you-enter" type and appears to have differed in at least one important respect for the cars of that type now in use. The rear platform was inclosed

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lard City Traction Company, 4ppellar.

Misil, P. J.

On the efficiently of January, 1818, at the corner of "sound nue and Faveath Sincat, in the city of Rickled in Timeshame you of Greistins L. Palm Call from the stee of a our chemitel of the Rockford City Truction Company and Treceived injuries. For oh the brought this suit to recover damares. She filed a declaration, to thish there was a ples of the meneral icous, Later ine obtain i leave to tile, and its file, four additional counte. to which there was nise a plam of the construit issue. We the trial the To ear term 1915 of the sire of a court of this Courty, Laidein joottamalent mer brens gid, by alleging that the consector of the street our negligantly permitted the exit door of the sax to remain o en while the our notion, which indused the plaintiff to believe that she . At caused beruint saw site or gold without the trighte yletes blo . A DESCRIPTION OF THE PROPERTY AND THE PARTY but the decurrer was overruish and one pleas of the renarch three lornerly made to the original assistation, mus ordered to themil -ive and illy to sacio soid the though the site of saig off to dence the court instructed the jury to return a venilat for the defendant, which was hone; t muthon for a A. trial was over-uled detain mon! illiming of the slave to the hold of - Linebea wolled lilian -

and recovery restricted our description of any old and state of account to the second state of the sec

and on the right hand side of this platform was a step and two doors, the rear one of these two doors being used as an entrance to the car and the other as an exit. The exit loor was not under the sols control of the conductor, but could be orened by any one desiring to alight from the car. On boarding the car through the rear of these two doors on the right handside of the ear, an intending passenger would proceed along a railing, extending الله الله المنظمة المنظمة المنافع المنافع المنظمة الم p with , and well passen in wall them to seright, give als fare to the conductor or Alse put it in a box provided for that purpose, mount one step and go tarough a door into the body of the par. A passenger desiring to alight from this car would pass through a door at the rear of the main body of the car, on the other side of the car from the door by which he entered the main body of the car, and, upon stemping down on to the platform, turn to the left and either open the outside door himself or have the conductor do it for him and go from the platform on to a step and thence up to the street. While the svidence is not quite clear en this point. It appeared that this exit foor was not controlled by any lever at the hand of the conductor, but was claned by a handle attached to the loor itself. The position of the conductor ordinarily and at the time of the accident here in question was, on the platform cetween the entrance and exit doors leading to one from the body of the car and behind the railing mentioned above. The sait icor, used in passing from the platform to the street, swung back against the railing when open and, as the space into which an outgoing passenger stepped was about two fast square it will be seen that when such an outgoing passenger stepped onto the platform from the sain body of the car, his prosence would prevent the closing contact, and and any its opening, if it was closed, by the condector, who would under such circumstances be standing behind such passenger.

ar this call the result of the same right to the the rear one of these the doors being used as an antrance to is our and the other as as as tht. The exit door was not under e solt control of the confidetor, but could be orange by any one . . ring to alight from the car. On bourding the cer through NAME AND ADDRESS OF THE PARTY O the contract of the contract o all the district or an inches The springle of the second state of the second ose, wount one step and go through a door into she body of nesd pinesurer destring to digit from this der Mould bean the coor it the rest of the acin body of the car, on the in the straight and allow by which he entered the acenis, of the car, and, u on ste ping coun on to the platform, . o his isi't was sither egen the outside acor himself or have subsect it for him and go from the platform on to a and there are to the street. While the sviusmos is not quite = a-en-this point, alpears that this exit foor was not or rolled by mry layer at the hand or the corductor, but was opened by a hundle attached to the door itself. The position of the conductor of instity, and as the line of the modison incr tire bar commind the muriton madicing all no act midden in -list this builder and the set to your ear and of the set of ing mentioned above. The suit loss, used in ge sing from the plate Late the the etract, event ouch spanish the railing when open and, fir armos jute which an outgoing passanger stopped was about representing and article and fine made facility and all by the enterty all the day, his grade is a suit body of the day, his graand the first transfer of the same to the same time. reader the work of the section of the work works and the section of the section o

became a passenger on this car about six o'clock on the evening in question. It was after dark and the lights in the car on the street and in the stores along the street, were lighted. At the car neared Second Avenue, lant pressed a push button. thereby notifying the conductor that she desired to Isave the car at that point, and he transmitted this signal to the motor were tuar left her seat, went through the exit door and atemped . . on to the platform. The unlisputed evidence shows that when she wid this, the outside door was blosed. While she was standing there to just as the car reached Second Avenue, its speed being . Lake med, two men came out of the body of the car, pushed by the appellant, opened the exit loor and stepped down onto the street. At that time the conductor called cut a warning toam that she would wait until the car stopped before elighting, but she either did not hear him or paid no attention to him, and passed out directly after the two men, stepping off of the stee and falling on to the strest. The land was stoked up by the con-2 -- Just the outer of -- 16 , Babanders, and was the an to a maintee inc hours. It is apparent from the evidence and from a plat of the back platform of this car, introduced in svidence, that as affect stood on this platform after the door had been opened by the two men in question, her presence prevented the conductor from closing the exit loor, and that her departure from the car was so sulden that the conductor had no opportunity to do anything to prevent her from leaving the car, except to call out a warning to her, as he Jid. Appellant admit In her testimony that when she left her seat, after giving the signal to stop, she knew the car was still in motion, and it seems clear to us that an ordinarily intelligent person, in the exercise of lue care for his can safety , could easily judge by the street and store lights, whether or not the car was in motion. It is apparent to us that, after the two men left the car, appellant followed without taking hold of

subsected a basesades ou time has seen size of the our ening in question. It cas after dork and the lights in onethe street and i. The stores along car neuron Second Avenue, adjoblance proceed a punh button, findianace, all ca display idea poddimen ad ou bar (maios destina e e ဦးရေးကြောင့်သို့သည်။ ကိုသည်။ ကိုသည်။ ကိုသည်တောင်းသို့ အထက် လွှတ်နေသည်။ အချိန်သည် အရောင်းပြုသည်။ This is a serious concernation with the contract of the contra the se and just as his one frenchal Sepond Avenue, dun specifical, a irened. The in owe out of the body of the birty of body of estanat, i indi the exit deer and are put fore calo th ್ರೀಕ-ಜಕರ್, ಆರೆ ಕೃತ್ಯಕ್ಷ. ಇದ್ದು ಸರ್ವ ಚಾರ್ತಿಕ್ಕ ಇಂಗೆ ಚಲಿಕರು ಕಡೆ. **ಅಂತಿಕ ರಾಣಿಕ ಕೆ**ಗೆ grant Prince are the a cycle are see self filten athor almosts also in To the grapeedu year wet tar hat La yide the ha and the same of the published

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any site rail or maying any attention to an ther or not the oar was still moving. When appellant steeped down from the main body of the car to the platform, the exit door was closed in the taken as nothing in the evidence to show that the conductor knew, or should have known, that any one other than a sellant intended to leave the car at this point. It is evident that the conductor warned appellant as soon as he discovered that the car door was open; and the fact that appellant did not hear his warning or orid no attention can not be considered negligeboe on his part. Witnesses for mobiles, not connected in any way with the company, heard the conductor's warning and knew that the cor was moving at the As appellee says in its brief, if appellant did not hear the conductor's warning, it was either because her earling was not as good as that of numerous other persons on the car or because she was not paying attention to her surroundings. In the latter case, she was negligent in the former case, the consector was not negligent.

We do not find any swidence in the record that would justify us in holling that the appelles was negligent in its operation of this street car, while there is considerable evidence to show that accellant was negligent. The judgment is therefore affirmed,

Affirmed.

The car to the platform, one shift foor was closed and there she will be the car to the platform, one shift foor was closed and there she inthing in the evidence to show that the confidence knew, on another have known, that any one chief the first land intended to lawy the car at this point. It—is—evident that his occupion walked the car at the point. It is confidenced that the car the contract that the confidence was contract the confidence of the confidenc

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk 200 I.A. 11

E. M. DAVIS, Sheriff.

RHD ap. 6/16

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

CHOIFE, G., VIRIADI, VIRENET COMPLETE C

Gen. No. 6147.

James M. Svan, Deft. in error.

VS

Error to Kendall.

William K. Loofbourrow, Pltf. in error.

Dibell, P. J.

Swam sued Doofbourrow in the circuit sourt of Mendall County and filed a declaration and had a summons issued to the sheriff which was returned served, and on October 33, 1914, at the October Term had a default and a judgment for \$676.71. On November 9, 1914, at said term, the defendant appeared by aptorney and entered a motion to set aside the default. On March 6, 1915, still at said fletour Term, he entered his action to withdraw the action to last aside the default and this latter motion was granted. He says that he afterwards, on March 15, 1915, at said October Term, entered another motion to set aside said default on affidavit, and that motion was denied. He thereupon optained a bill of exceptions concerning said motions and now prosecutes a writ of error from the order refusing to vasate the assignment.

The bill of exceptions does not show upon what ground the first motion was based. It obviously was never heard but was withdrawn. The second motion, assuming one was made, as to which the bill of exceptions is silent, and the second motion was upon two notes for different sums, one described in the first count and the other in the second count of the declaration. The affidavit related to "this not." without showing whether the first or second note declared on was meant and it alleged that that note was given in compliance with a contract for the exchange of lands. It did not state with whom this contract was made nor any of the terms of the contract. It dected that James M. Swam aid not comply with his part of the contract, and because of his failure to do so beefbourrow hid at received any consideration "for the above mentioned note," and

" os M. Sran, Deft. in urnor.

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whe islands. He thereupon obtained a pict of geographics.

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that he denies that he is indebted to Swan in any amount. The affidavit did not show what Swan was required to do by the contract nor in what respect he failed to comply therewith. It stated only the legal conclusion of the affiant and no facts by which the court could determine whether his conclusion was well founded or not. This afffdavit is entirely insufficient to show that he had any defence to either note and it practically admits that he has no defense to one of the notes. The facts should ...vo Uson at itsa so that the court could determine whether he had any sienes. The affidavit further said that Swan was indebted to the affiant in the sum of \$3000 but it did not say how the indebtedness arose nor what the facts are, and it stated but a conclusion and is insufficient. Moreover, as a general rule, a default will not be vacated merely to let in a sat off, for the defendant has a perfect remedy by bringing suit against the plaintiff upon such set off. The court Sidnot err in denying a motion to set saide the againity default.

In this court Loofbourrow claims that there is a defect in the return of the sheriff upon the summons. So far as appears from the bill of exceptions this point was never made in the court below. By the motions above recited he entered a full appearance in the case, and he cannot be heard in this sourt to urgs a reason for vacating the matter default which he did not present to sourt below.

The order is therefore affirmed.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I. CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



6 165

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

200 IA 113

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY Clerk.

E. M. DAVIS, Sheriff.

M' A Deal Sport Co

BE IT REMEMBERED, that afterwards, to-wit: on
the clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6165.

W. D. Chemical Co. appellant.

Walter Tack, appelles.

Appeal from Paoria.

Dibell, P. J.

By a printed and written contract, detal July 29, 1915 the W. D. Chemical Company sold and Walter T. Tael bought 6,000 pounds of hog and cattle pewders for (15.00. On June 18, 1914 said company sued Teel in the Peoris circuit court upon said contract for the payment of said (18), and the common counts added, and Teel pleased the general insus and cortain special pleas. On a jury trial, at the close of all the proofs, the court instructed the jury to find a verdict for defendant, and such averdict was returned, a motion for a new trial was senied, and defendant had jusgment, from which plaintiff prosecutes his access.

It a peared from plaintiff's proofs upon the trial that defendant, at the same time that he signed the contract in guestion also signed and delivered to the company his promissory note for .530, the price of said medicines, and that thereafter and before this suit was brought, the company cold and assigned said note to ons R. F. Zehr and when this suit was brought on June 13, 1814, Zehr was still the owner of said note. It is a recornized rule s . That in mid of the note of the debtor for a pre-existing debt is not payment, unless it is expressly agreed to take the note as payment, or unless the exeditor parts with the note or is quilty of Latina in its resentation on your . This v Earlier, 5 Johns, 83. This was a to the total - reception and applied by this court in more more Thu mer, 49 Ibl. App. 593. On wrinciple it must be that when plaintiff sold and assigned this notes, it did not retain a

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Sy a paint from the contract contract, is the July 10, 1900.

10. Observat from any sold and "hitem". The convents for the convents for the convents for the convents for the convents of sold and the contraction in the contraction of the convents for the contraction in the contraction of the convents for the convents.

It is peared from plaints of a contract the residue of a contract is reserted featient, at the set the find that he dignetic fit contracts to the object of the contract of the set of the contract of the con

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cause ofaction against defendant for the purchase price of the merchandise, and if that position could be maintained, the vendes of
the goods could be subjected at the same time to two actions by
different persons to recover the same debt. We hold that when plain
tiff sold and transferred this note to Zehr, it did not retain a
cause of action against Teel for the merchandise. That note was
outstanding to the hands of Zehr when this suit was begun and
therefore plaintiff then had no cause of action to recover for the
selling price of the goods, and the court properly directed a
verdict. Moreover the president and the general manager of the
plaintiff testified that the company took this note as payment
for said goods, and this was not disputed in any way, and this
appears to bring this case within the other branch of the rule
above stated.

Zehr sued Teel upon this note and upon another note in the county court of Peoria County, and that suit was pending and on trial when this suit was begun. In that suit Teel pleaded the general issue and that the signature to the note was not his signature and another special plea. On that trial Teel had a verdict as to this note, finding no cause of action. Appellant here assumes that that was a finding that the signature to the note was a forg ry and therefore argues here that as that note was a forgery, the original cause of action remained in plaintiff. There is no evidence here that the jury in the Zehr case found that this note was a forgery and hance the argument on that subject is not well founded. If the only issue had been whether the note was a forgery, there would be force in plaintiff's argument, but Teel also pleaded the general issue to Zehr's declaration upon this note. Under that plea he could have proved cayment. It appears that Teel only received 2,000 pounds of the 6,000 pounds which he purchased. If he proved that Ishr was a rest of the first sharety, in some

a of solion against sales into the community prises of the sales, and if the position out the classical to characters as the case to the actions, by as great could be subjected at the sale that a sale that could be subjected that there is the cast when plain for and transferred this rote to Tahr, it is not notating solid and transferred this rote to the case of the case of the sales and transferred this case of the case of the case of the sales greated the case of the sales greated the case of the sales greated this the president and this the case of the sales greated this case of the sales to better this case of the case of plans to be the case of the case of bottom this case of the case of the case of the case of bottom this case of the c

and all the last two last two last two last and dark that said and y court of Fearin County, and that enth and proff in this or profit. -si marrors est tehnolo doet divo selv al . copto the time pidt a min traffirmis ris com mix ofon est of truthamia of tall int to a straiting no cause of action. A goliant here amound that the -aren't . . . The gar are were the companies of the series were and the series are series are series are series and the series are outers free training of the training of the second of the configuration softon remains in glaintiff. There as no order we have force where it is all their two is designed the and discount out ind been mether the pote was . Tour my, there were as part of paint and a reference to the colour past also for the colour past and the colour pa The light of article is recalled by the majoration of ayanat. It a pani hame had be a but the first a transfer to motomoto - 'To Grand and ed Baid attack they

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shown a complete failure of consideration by showing that the merchandise was worthless or was not what it was represented to be and that he ascertained that fact and delivered or offered it back to the company. He could have proved other defenses under the general issue. No proof was introduced from which the jury could know what particular defense it was which was sustained in the county court in to it this note. Therefore there is no proof here that this note was found to be a formary. The proof in this case is that Teel did and sign the note. The fact that he filed a plea that it was not his signature does not make it a for ary. Even if Tael testified on the trial of the Zehr case that his name to that note was not his signature and not by his authority, still there may have been many other witnesses to prove that it was his signature, and the jury may have so found but may have systained some other defense presented by him. Plaintiff after a fashion sought to inquire of two witnesses what Teel testified in the county court as to the validity or invalidity of this note, but he did not make any offer to show what he expected the answer to be, as required by the rule laid down in Ittner Brick Company v Ashby, 198 Ill. 562 and Court of Honor v Dinger, 123 Ill. App. 406, and if that rule / is modified by hat is said in Hartnett v Boston Store, 265 Ill. 331, yet any answer that could have been made to these questions, unaccompanied by any proof of what other witnesses testified in the Zehr case on that subject, would not have been material here, where the question if material at all, was on what ground was Zehr defauted in the suit on this note, and that is not disclosed at all by the proofs.

The judgment is therefore uffired.
Nisaaus, J. took no cart.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, no hereby certify that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

20014.119

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

THE CONTRACT OF THE CONTRACT OF SERVICE AND A SERVICE AND

Gen. No. 6167

June E. Mills, appellee

VS

Appeal from Henderson.

Village of Oquawka, appellant.

Dibell, P. J.

On May16, 1914, the husband of June E. Mills occupied a part of the Graham Building in the Village of Oquawka, in Henderson County, as a cakery. There was a brick sidewalk, ten or twelve feet wide, in front of this building and at one time there had svidently been a stairway leading from this sidewalk Sown to a cellar underneath, but its use for such a purcose had been abandoned many years before the date named, the stairs had been removed, and the opening of in that sidewalk, leading to the stairs, had been covered with the wooden door. On the evening of the day in question a wheelbarrow was standing on this wooden door, having been left there by Mills, as he intended to use it during the night for the purpose of transferring bread to the depot for shipment on an early morning train. Between seven and eight o'clock that evening several persons were sitting on that wheelbarrow, when the wooden boor gave way and they were all precipitated into the cellar. The evidence shows that June E. Mills, who was one of those thrown into the cellar, was quite zeriously injured. She was at the time in a delicate condition, and about three weeks later suffered a miscarriage. /Shi brought suit against the Village because of her said injuries and upon a jury trial rac ived to various or public. A motion of a trial was overruled, and plaintiff had a judgment \cr that amount. from which the defendant below accells, arguing here that accelles was guilty of contributory negligence, that the village was not negligent, that the damages are excessive and that the pourt bolow erred in its rulings on the evidence and the instructions.

36 .16 .115 TU-S J. VIII. TO SELLE A paul tron Bandurson. "Illege of Ocusavise, actablent. On May13, 1914, the headend of June T. walls occupied . of the Graham Building in the Williams of Occasion, in - - - - con County, as a habory. There was a raiois enforcedly, was land and the transfer of this ballding and at one tand tion pline still more garbosof yevelines a need yitholive to, subjust undernouth, but its use for such a pur cus har - 11 abandoned many years before thats named, the sealing the commission of the coeming on in their sidenalk, leading it palacers of the source with the wooden inou. In the treatment THE RESERVE OF THE PROPERTY OF Ty weals, on all about micke by walley to be about the own the night for the purpose of truniferring brend to the Lagar to ahipment on an early morning train. Bernsin ser many And an analysis of the second participation and the second of Mariel the strength of the language of the strength of the strength of . Litate into the ceilar. The systemos shows in a fune I. I de was one of those thrown into the certain, all telts . Housey injured. The was all the day a deligent condition, about three weeks later bullered a micoszmange. (Enf brown, e or a similar the Villige biologic of ber sain injuries as a crea ay trial received & Vernich For (2,000) A motion for the . Land on the first transfer to the contract of the first and and the first transfer to the first transfer transfer to the first transfer transfe i ii.j. trad apid galagan (ai. 1) a wolled dasharlah and della is, in a plain vit tell to an application of the tipy vising a reno as as, that the dameges are spacestve of this to be defined

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The svilence clearly shows that the wooden foor or board cover which fell in, and the supports underneath it were return had been in such a condition for a long space of till. It it et two years before this accident, a member of the villes of the the end of his came through a rotten hole in one of the plantcomposing this wooden cover, and in apite of his knowledge olication on this part of a public in all to a cast it. . . to to his knowledge the place had never been recaired while it was on the Board nor up to the time of the addidant. Dt. : 1:nesses testified to an entire lack of repairs on 'la ... s er nineteen years or longer. Certain pieces of timber were ministed in evidence and lagntified by at least one witness is a 1 m and of the supports of this wooden cover. These timbers of the Appearant chains that hey wills it buffled the floor and should not have been admitted, but we consider that a su figient identification was made. Other evidence was introduced to show that xhax this wooden portion of the walk was in an undade condition for public travel. The evidence further showed that the City had been notified of the condition of this walk by complient asspirate to the rayor is or president of the village board with a request from unpelied that the walk or that pertion of it be sondemned and removed. This complaint was ignored, apparently without any investigation of the part of the village officials. Under the principles laid down in Sacrwin v Gisy of Aurora, 357 Ill. 45%, the jury were warranted in Sinding from the svidenos that in this case the duty was laid on the city, not merely of inexacting inspection of the sidewalk, but also of inspecting the supports underneath the sidewalk to ascentain whether or not they were sufficient. It is avident that this was not don't or even attempted. We consider that the jury were warranted in finding -Ithat the evidence shows the village to have been guilty of negligence, as charged in the amended declaration.

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grafikîrîna î kanaran îndin çepî dir kûdê relîkabe. Hatan îla yidîrî anin akad bi eydilkîr It is claimed that appelles was guilty of negligence, in that her complaint to the mayor regarding the sidewalk showed that she was cognizant of its condition and that, in sitting or being on this rotten portion of the walk, she was not in the exercise of due care for her own safety. It appears from the evidence that her complaint only related to the surface of the walk and that she was completely ignorant of the conditions existing underneath that surface. We do not feel that the duty could be laid upon her to ascertain the condition of the supports of this sidewalk and do not think there was such evidence presented to the jury that it should have found appelles had such notice of the defect that she was guilty of contributory negligence.

Complaint is made by appellant of the action of the court in refusing certain instructions requested by it and also in giving certain other inatructions at the request of appelles, but after considering all the given instructions as a series, we do not feel that any such error exists. It is true that certain given instructions cast upon the Village the absolute duty of keeping its sidewalks in repair, while a better statement of the law would have been that the duty of the village was to use reasonable care to keep its sidewalks in reasonably safe condition for public travel thereon, but one instruction given at the request of ampellant and one requested by it and refused sont ined as the statement of the law as the instructions complained of, and we do not feel that appellant is entitled to complain of that feature of the given instructions. Aspellant complains of the refusal of one of its requested instructions, which told the jury that if they believed from the evidence that this portion of the sidewalk broke because six prople were upon it, then there could be no recovery. We do not consider that this instruction was correct as applied to the facts. These six people were not piled, one upon top of another, on one portion of this

It is claimed that appalled one wilty of arglicates, in

the continue of the continue of the rate and in the amended of the care for her can entity. It are are from the errorations that her complaint only related to the consisting of the case complaint of the consisting of the acceptant of the consisting that she was complately ignored to the consisting errorath that surface. To not feel that the cary could be indicated and do not take as sond then of the surface of this it won her to secretain the condition of the surface of the jury that it should have found arrelled had and notice of the defect that she was pullty of contributory architects.

Complaint is talk o ar ellout of the action of the acurt in refusing servain instructions requisited by it and also in a lift cariain other instructions at the coquest of ancounsel, but if if considering all the pi.ca instructions as a reases, we in new last that any such arter arists of the true that coursels norts of the tions cast unon the Villagt the absolute duty of hesping its sidewalks in regult, while a netter that or not less law, outly officing seem seem of the opposition as to be given ent tend mead even care to itse its atdowalte in reasonably this is it is included in the contract of the contrac lind and one requested by it and reduced contained for statement of the law as the instructions complained if, and The so not feel that arrelled to service by secrification of ever THE RESIDENCE OF THE PARTY OF T white start and contains out wor devoting your listers ... I will The same of the sa -to the first and the same and

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by, a distinct portion of the walk, and the sidewalk ought to be in such a condition that if ceople stood upon each portion thereof they would be supported.

Complaint is made that the damages awarded were excessive. There seems to be no question but that depelled was injured by her fall. She complained of an injury to her arm and mack and she suffered a miscarriage shortly after the accident. The was under the care of two physicians for a considerable time after the accident and, while appellant claims that her miscarriage was not due to the accident, still the surrounding circum stances, as shown by the evidence, are such that we believe the jury justified in considering it due to the shock she received. In view of her injuries, we do not feel that the amount awarded was so great as to warrant us in disturbing the conclusion of the jury on that point.

We find no reversible error in the record and the judgment is therefore affirmed.

Affirmed.

in such a condition blind if youghe shook upon each portion thansor

siye. There seems to be no question buy had directed in injured nor fall. The compinions of an injury to her arm and rook this ages the compiliance of two physicians for a considerable time.

To was not due to the accinent, while the suprecurit g circum and guestified in considerable to the evidence, are such that no believe the ry justified in considerable to due to the shoot one reserved.

They of her inturies, we do not feel that the amount and rich was so great in to inturies, or in alchemism the considerable of the amount and rich that point.

We find no riversible error in the record and the judgment is therefore affirmed.

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CMAMP OF TAXABLE
STATE OF ILLINOIS, SECOND DISTRICT. SS. I. CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.
Ctorn of the Appendic Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

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BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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perstament subharaen wir kan geschiltstätte ut die 1 und 1 sehr ummaß und Derstellung von de 1 ann 2 flag in Französier in der de und von der det in helde Gen. No. 6191

Frances Mertel, Deft. in error.

vs Error to LaSalle.

Charles F. Walter, Pltw. in error. Dibell, P. J.

Transa Nortel (forwarry Souter) due: Charles W. olter to recover \$250.00 which was said him to bind a real setate bargain, which was finelly abandoned. At the close of the evidence the court directed the jury to return a verdict for her for \$250 and such a verdict was returned, a motion for a new trial was usual and plaintiff had judgment, and this write of error is brought to review that judgment.

Walter lived at Cedar Rapids, Iowa, and owned two adjoining lots and a dwelling upon one of them in Paru, Illinois, and the same was in possession of a tenant, named Strack, and Walter had the right to terminate the tenancy by October 1, 1914. Walter had upon said premises a sign that they were for sale. Frances Sauter was about to marry J. A. Mertel and desired to purchase a place. The negotiations were all by letter, and the only question is whether the minds of the parties ever met uron all the terms of a valid contract. All the latters were preserved and were in evidence, except fire falter trate isa sanding one latter at hore. Tertal tests jad the subset receive. It is argued in her behalf that the court might well find from the evidence that no such letter was sent. The question whether such a latter was sent was one of fact for the jury. The four fours not usbire instruction, show assume that such a letter was sent or else the judgment must be reversed for fallure to submit that question to the jury. letters constituted a complete contract was a quastion to be determined by the court. Telluride Power T. Co. v Crane Co.

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Trror to Enfalts.

L V

Charles F. Malter, Plic. in error.

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Frances is tell (formarly Sauter) roti Charles W. Tolthe to roover (\$550.00 which was paid bin to ind a mark that of a tell cargain, which was Singally account. At the close of the sylmismos the court irrested the jury to return a vertict for the for the field and such a viridist was returned, a motion or a new trial was isnied and plaintiff had judgment, and this arit of stror is crought to revise that judgment.

Walter lived at Cedar Englis, Iowa, and owned two adjoining lots and a dasiling upon one of them in Peru, Illinois, and the sare was in possession of o teant, meed Strock, and "mit had the right to termi ate the tenancy by October 1, 1818.

Walter had upon said gremises weign that they were "or and."

Trunces Sauter was about to carry J. A. Wortel and tenired to purchase a place. The negotiations were all by letter made to only question the continue of the aiming of the letter walts contract. All the letter were are accorded to the letter were the senting one letter which Mrs. Perush that Talter tentiled in

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question whether such a latter was cent was one of the tradiunt.

Jury: The court bould not leaded what quartien. Year, no and assume that such a lotter we will all account for had not a test was then and a form.

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In all accurse, that such a latter was the was the continued was a much that a

Mertel began the negotiations by a letter, dated March 7, 1914, addressed to Walter, whorsin he told Walter that he passed by his place that day with a friend and saw the sign upon it and he thought that friend appeared to be a prosperous buyer, and he asked for lowest price and particulars. Under date of March 15, 1914, Walter replied to Mertel by a letter containing the following among other things:

"I want \$\cap\$4500.00 for the whole place, or \$3500.00 for house and one lot, the fruit and berries are all on that one lot, you see Mr. Strack and ask him to let you show your man the house, he has rented the place for one year, but if I sell he must move bb Oct. lst. 1914, or if your party wants it sconer, I guess I can arrange that with Mr. Strack.

I will take \$500.00 or all I can get cash down and bases to suit buyer, at 5 per cent. I will want \$250.00 to bind the bargain. I will give you \$50.00 if you make the deal. You know the place, and can tell him all about it, there is not water, furnace, bath and toilet, sewerage all in, cupboards and sinks built in, also china closet; get him interested and show him the place, and then he can see what there is there, let me know what you make out as soon as possible."

Under date of March 18 Mertel answered in part as follows:

We finally got to see the house last night and we thought it was just what we wanted, but don't you think you could give us a little lower grice. If we cought the wholeplace and paid spot cash we would like to occupy it by Yay lst."

Falter replied to Mertel under date of March 19 in part as follows:

"I can't sell it any cheaper than I priced it to you. I

Branch for Balan

Mericl be in the augmentions by a latter, dried and anon a lefter, dried and a lefter, dried and a lefter and a self "author are as passed by his passe that way with a "aloud and out the oign when it and he thought hist frank a passed to be a prosestrous and he saked for lowest ruled and anticulars. Indeed and anticulars. Indeed of Murch 15, 1914, Walter a pilited to arrel by a latter containing the following among other things:

Towns [4500.00 for the shots place, or fonce.]

Let house and one los, the fruit and persess are all on that one los, you see hir. Strack and take him to let your san his house, he has centred the place for ore year, but if I sell he must hove by Cot. lat. lat. ar if.

Larty wants it seems, I jures I can persongs that this

to since the largeds. I will pive peak \$80.00 if you had ladded to since the know that ladded to say the ladded the know that ladded to have the hot water, furnace, hath and tollet, sewerte miltipace to hot water, furnace, hath and tollet, sewerte milt, oupboards and einth built in, has obtain electronic and ones and the plant in the second water is there, het had the second as and there as a court the second as according to the second as according to the second as according to

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date of March 18 dertal and sate of the left to teas;

To finally not to see the heart that hight and a trought to a just what we manted, but iten's sea 'hack not coult like to a titte lower price. If a rought the door page to by 'er hit."

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paid #4,500.00 and can't loose on it. I don't know thather

Strack will move or not, he might ask so much. I don't care

about the cash money. I would just as soon have a good piece

of land that will increase in value."

Mertel replied in part as follows under date of March 33:

"Inclosed herewith please find bank draft for \$350.00 to bind

he bargain by Frances G. Sauter for the entire place, trusting
this will be satisfactory and you will croceed with the

proper papers. Kindly take up the matter with Mr. Strack
we would like to occupy by May 1st. 1914."

Walter replied to Mertel as follows under date of March 35: "Dear Sir: I have your letter and bank draft of the 33rd. but will not bind the sale util I hear from Mr. Strack. If he asks too big a price to vacate by May 1st. 1914, I will not sell only subject to the terms of his lease, giving him until Oct. lst. 1914 to vacate. If his price is more than I care to pay, may be with you and I can arrange some satisfactory way to buy the Isase. You may let me know what you think about this plan. I will keep your name in grivacy at mesent and probably I can get him to vacate at my price. There is furniture stored upstairs in the house that will have to oe left there until fall. The party buying the procenty will also have to buy the window shades which are in wood condition. The price will be aloaco for the shades. If I can arrange with Mr. Strack I will have the necessary papers unum un i salabaige"

He req ired it is a litture to a uprimition window shades and my \$10.00/therefor. Miss. Sauter then wrote Walter in part as follows, under date of March 30:

"Incloses deregith please find bank draft for [SSG.CC to min!"

"he bargain by Frances G. Sauter for and place, tructing this will be satisfactory and you will ercosed with the proper papers. Minily take up the eatter with mr. Strack we would like to occupy by May let. 1914."

"il replied to Martel as Collows under date of March 35: "Dear Sir: I have your letter and hank draft of the Berd. but will not bind the sale u . il I sear trom Mr. Strack. If he ske too big a price to recorte by May 1st. . Old, I will not sell only subject to the terms of his isses, mixing him until Oct. 1st. 1914 to vacate. If his price is rere than I car. to pay, say be with you and I can arrange some satisfactory way to buy the issee. You say let we had thist wou think about this plan. I will keep your name in privacy at wealth and probably I can got him to violate at my price. There is durniture stored upotative in & a nouse that will have to be left there until fail. The carty buying the encapity il. also have to buy the sinder whates with the cod consibion. The prince will be (10.00 ber whe accides. Is I can imagan yawasacsa ini sv . Lii I michat? . W Ati. spamaan drawn up in silately."

till to conserved this that but bure introduced to the stations of the conservations of the conservations of the conservation of the conservation and the conservation are the conservations of the conservations.

"I note by the letters you have sent that you are not trying very hard to accommodate me with the house by May 1st. Now if you do not care to make this deal, we will pass it up and you may return the \$250.00 or if we can arrange a satisfactory deal I shall want the whole place, insurance papers, tax receipts and all other proper papers including lease so I may collect rent, all for \$4500.00 the shades are of no benefit to me as I want new things to begin with."

It will be observed that when Talter received the [250 he refuse to finithe pargain by it and that in the letter just quoted Miss.

Enuter calls for the return of the [250. On March 31 Walter replicates follows:

"I have your letter of the 30th. inst., and am enclosing letter from Mr. Strack, whereby you can see that it is impossible for me to get him out by May lst. but if you will buy the place. let him hold the lease until October I will be there by Saturday of this week to close the bargain, or as soon as I hear from you.

I understood by your former letters, that you would not buy the place unless you could take possession by May let. but by your last letter, I understand that you will buy the place immediately if we could make a satisfactor try deal, that is I will turn the lease and papers over to you dating from April let.

I will hold the draft for \$250.00 until I hear from you / or have a verbal conference with you."

The letter from Strack which Walter enclosed therewith showed that his wife was in a haspital and that he was not permitted to discuss with her the question of giving up the lease, and that he therewith remitted the rent for April. On April 2 Miss. Stauber replied a follows:

"I note by the latter's you have sent that you are not trying very man; to accomposite as with the house by lat. Nowlf you you do not care to make this deal, so will pass it up and you hay return the factor or if we can arrange a satisfactory is experte and all other proper capers including lates no I nay collect rent; all for \$4500.00 the chades are of mot benefit to me as I tant new things to bogin with."

oind tie wargain by it ind the in the lefter just queted wise:

Shuter callsafer return of the jago. On March 31 Walter replied

as follows:

"I have your letter of the 3Cth. inst., and am modering letter from Wr. Strack, whereby you can see that it is impossible for we to get him out by May let. but if you will buy the place. let him hold the scae until October I will be there by Saturday of this week to close the bareain, or as seen as I hear from you.

I understood by your dermer letters, that you would not buy the place unless you sould take possession by May buy the place immediately if we sould make a satisficatorsky issal, that is I will turn the least and appears over to you lating from April 1st.

I will hold the draft for [250.00 until I hear from you to the draft for [250.00 until I hear from you to the draft of the color will a heapital and that he are not provided to discuss the her the question of rivirg up the case, and that he therefore a fine question of rivirg up the lease, and that he therefore a fine color regiles as

"I reed your letter of March 31st. and as the offer is favorable I wish to close the deal on next week Thursday or Saturday which ever time is convenient for you to come. You may write me when you will be here or call Joe Mertel when you reach town and I will come down town with him." hat letter lix not treat the acal-as slesen out expression ich for him to come to Peru and to close the deal on Thursday or Saturday of the following week. It will be observed that he had said that she would have to buy the window shades and pay \$10 therefor and she had refused that condition and he had not withdra m He had imposed the condition that furniture should remain in the house the fall and she had not answered that and she had told him that she should want insurance papers, tax receipts and all other proper papers, including the lease and he had not answered that, except as to the lease, and that he was waiting Lor a Werbal conference with her. Walter testified that he wrote her a letter dated April 3, saying that as long as she was satisfied to take the place he would be in Peru the next Saturday to close the deal, though he fid not remember exactly what he wrote. She wrote Walter as follows under date of Arril 4:

"I wrote you on the Sd.inst that your offer seemed favorable and I would like to close the deal; but yesterday I was given a much more liberal offer, and would appreciate if you would consider with me. I was given permission to remain on the same place after Oct. 1st. which I will occupy till then; in fact I hardly think I could arrange to move then, and as the rapt from this place foesn't near cover interior, taxes and insurance I would much prefer to not close this deal at all now. If in the future I desire the place (which would mean much more expense and inconvenience to me than my present offer) I would be very glad to make a par in ton, trusting you will let me know at your earliest convenience

"I reed your latter of March Slat. And he the effort to favorable I wish to alc. o the deal on next week Thursday or Saturday which eyer tive is convenient for you to come. You may write me then you will be here or oath Joe Navish when you reach town and. I will some down town with him."

thin to some to Peru and to sleep the lank on Thursisy or the the fellowing week. It will be observed that he had a had a served that the sindow states, and pay dit stor and the mould have to buy the sindow states, and pay dit stor and the near that furniture should remain to had toposed the condition that furniture should remain to be house till rall and she had not answered that and she had the house till rall and she had not answered that receipts the payers, including the loads and he had not assert to the lease, and that he had not had the har a letter dated April 8, saying that as long as and has eatisfied to take the place he would be in Peru the next Ensureacy

"I wrote you on the 2d.inst that your crismst

to alose the deal, though he its not renember enactly that he wrete.

The wrote Welter as follows unter date of Arril a:

part players a class of this part at little t (salte final)

if this is satisfactory to you and if you would be kind enough to return the \$350.00.

This was a witherawar from the esociations and its bain right to (withdraw unless all the terms of a binding contract had been arranged. Under date of April 6, he replied to her that she must stick to her agreement or lose what she had paid down. He therein told her what insurance he had on the house and when the policy expired and offered to turn the insurance over to her without charger this being the first time that he had replied to her request that the insurance papers should be turned over to her. He also stated that he had an abstract which he would give her and that he would be at a certain office in Peru on Saturday April 11. He did appear at that office at that time and Miss. Sauter did not a pear. It seems entirely clear/to us from a consideration of the foregoing correspondence/ that at no time did each partyagree to all the terms of the other. Miss. Sauter refused to pay extra for the window shades and Walter did not withdraw the demand that she should. Miss. Sauter demanded the insurance papers and Walter did not offer to comply with that requirement until after she had withdrawn from the negotiations. His request that she should allow certain furniture to remain stored in the building had never been accepted by her. She requested the tax receipts and he never offered to deliver the receipts to her. She requested of an artistization in the those papers were had not been determined. It is evident that /it was intended to endeavor to effect an los and an los , various matters when he came to Peru and had a verbal conference with her. There had been no discussion or agreement as to the form of the deed. Walter had received the rent for April and there had been no agreement whether he should retain it or should pay it to Miss. Sauter. It is our conslusion that the minds of

if this is satisfactory to you and it you would be list enough to return the 1880.00."

Life fraction (sire bounded biological side Lord) - lewers. und und chail the Serms of a birding contract and heen arrenged: Under date of April C, he replied to her that she must with to her arresment or loss must she had prid down. He therein fuld her what insurance he had on the house and when the policy expired and offered to turn the incurance over to her without charge, this being the first time that he had resited to her request that the insurance papers should be turned over to her. He also stated that he had an mostract which he would give her and that he would be at a certain of dee in Peru on Saturday April 11. He iid appear at that chias at the and Yea. Sauter did not a pear. It seems entired; alear to us iron a consideration of the Sere pin correspondence that at so time ild each partyagree to all the \terms of the bring. Miss. Sautor refused to pay entry for the winiow soudes and Walter did not withdraw the desand that she should, Miss. Sauter decanded the issurance papers and Walter did not other to comply with that requirement until after she has thitrant from the segetiations. Mis request that she should allow cortain dernstours to recain stored in the building and never buck head by her. She repussion that receipts and he have of their to lediter the receipts to her, She requested dires arrest parest and at these papers were had not been determined. It is switcht that it was intended to endeavor to effect on eggessent on these remary land tare a when he came to form that a vertal and orners ith her. There had been no blocketion or agreement as to "he The street of the same of the violette of the same of the same ment to the girly danger to indeed describing all and last could

no state and that constants are at \$7 , reduct, as \$2 of \$1 are

the parties never met on all the terms of a contract. Corcoran v White, 117 Inl. 118; Middaugh v Stough 181 Inl. 312; Scott v Fewler 237 Inl. 104.

The judgment is therefore affirmed.

ties never met on all ble tions of a controls. Corecran v

- Judgment is therefore allimacia.

-

STATE OF ILLINOIS, second district. st. I, Christopher C. Duffy, Clerk of the Appellate
SECOND DISTRICT. SS. I. CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.
Ctern of the Appentic Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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A RICE HAIL DATING

in a check of a service contrate out the service of a ser

Gen. No. 6311

P. J. Millett, Deft in arror

VS

Error to Kane.

D. J. McDonald, Pltf in error.

Dibell, P. J.

D. J. Millett cwns a farm near Paris, Kentucky, where he lived and he tatte contracts for railroad construction work in various partz of the United States. D. J. McDonald owns a farm near Aurora Illinois where he laves, and he date like work in various parts of the United States. The parties had known each other for years, and during the time covered by the transactions here involved were in various carts of the South. On Aptil 16, 1914, Milisti recupit this writ analyst MoDorald on for a rest romissory notes. or cr 1,000, inted May 10, 1809, one for \$1,000 dated June 30 lede and one for arragex/11,300.00 dates August 21, 1909; dash une a jarani with interest at hix oer sent car account Ha Wild! a special count on each of the notes and the consolidated common counts. McDonald filed numerous pleas, the man general issue, a denial of signature, set off, release, payment, accord and satiafaction, lack of consideration, and that thenotes were given in a partnership transaction between the parties, the accounts of which had not been closed. Usen a jury trial there was a verilet for plaintiff for \$4,083. On Rebruary \$2, 1915, and on April 12, 1915 after motions for a new trial and in arrest of full-set and and overruled, plaintiff had a judgment for a, 117. Ci a menoust with legal interest thereon from its resultion. This is a reof error brought by McDonald to review which to the substitute to

The special counts on the notes did not state that they

(were payable at any particular 1. 30. If the 1. 30. If then

of Millett, he stated that the notes were payable at Johnson

(City, Tennessee. He did not seak to amend the special counts

(of the declaration, so as to correctly describe the notes.) There

Bed. No. Sill

P. C. Militty, D.Ch in acros

Turor to Tous,

D. J. Malonalo, Plan in or au.

Dibell, P. J.

E. J. Willett ouns a lign near Peris, Westrong, whore he layer and he full a contracts for railroad construction was in waring parts of the United States. D. J. McBenald owns ? Surm rour throws. Tiller there he times, was he high like work in wartons ourth of the United States. The parties had known each other for makes, and during the time covered by the transcotions here involved in various carts of the South. On.Anthi 16.-1874-chillerit Loter greesimong deal earch no bildaplicy topicys thus The as 1900 Emplement output and place of the control of the contr leif of sweetergerasours store agreeful count on each of the notes ind the sociaclifulted opiner counts. Yadonala filed numerous placas, the arm benemal i aus, m senial of signature, set off, release, coysent, accord and estinflaction, hack of som identition, and that the notes were siyed in a Meide to compose of' (assistant off mornism mointenant gidenesting) nol. taileast or any amount faither yout to may be about main for datiff for (4,0%). On Tobrang Bu, 1811, as on tril 18, 1913 ment the thought to to the one of Aphylante and to be judgment and then verruled, plaintief at a judglent for a, 117, orieg the verdict tir. 4 ti tint ... ititar or fit mort no. veit desteini lare. Ati and a subject to a state of the state of the

The special counts on the motes of a not state that they represent to payers at any particular of the On oron, and insticated that it is the counts of the first that the sense of the sens

was a therefore a variance between the three special counts and the three motes froven, and there could be no recovery under said special counts, and McDonald was entitled to have given three instructions which he kaked, alrecting a verdict against plaintiff as to the first, second and third dounts of the sectionation. Eur Millett proved the existence of the notes, the signature of MoDonald thereto, his payment to McDonald of the principal sums named in said notes and that he lost the notes after naturalty. Te is fore entitled to recover unless the common counts, it same asfenses hereinafter raigness to usua noi extendibles, with McDonald was not partice by "as maint of he court to have mail tires instructions. MoDonald wimithed a Ring Tor and reserving the three sums of money; and the three checks upon which they were paid were in evidence bearing his endergoment; and he admitted giving memoranda showing his receipt of those several sums. He claimed to dough whether he gave notes for them, but letters from ced Tad nolusively that he did sint a note or him in avidance all each of said sums. He dated not claim to have paid them. The object of the common counts in a seh a suit in to rectast a claimtiff against some ascidental variable in the description of motes suel Jan 8

MoDonald claims that in February 1903 he and Millett met at Knowville Tennasses, and formed a partnership in railroad construction work; that he was to put in his equipment, worth perhaps \$30,000 and Millett was to put in \$50,000 in bash and Millett was to be allowed six per cent interest on his money and WoDonald to it in allowed six per cent interest on his money and WoDonald to it in allowed six per cent interest on his money and WoDonald to it in allowed six per cent interest on his money and WoDonald to be made upon his equipment, and that these moneys were advanced by Millett to McDonald for the expenses of waif portnership, and that the partnership ended in December following without any contracts being taken or any work being done; and he claimed to have spent \$6,000 or \$2,000 in expenses in travelling about the country and trying to get contracts, and while he did state

The last section of the section of t the contract of the later of th The state of the private billion The Valley of the Party of the ont the start of the start of the south the Minimus and the sale of the definite and the following the first terms of the first terms . It is a payround to beloance of the right owns also for -experi-se well a firm to refler in too but tool on their bon beton . The control of the manager was been been been at a fatter and in the particle by the persons of the sourt to give and a - saturagelong. Nofeneld windthed worting for an Experiency mark divide burd addubbt amps soll who tyenous to awar ser The field our earlightment about the galaxies consulty, which we will be the III alcijona jeliji. ar ann a the suit of the quality and a note to the series of the area and a note to es of agil rura. He ased not claim to be regardly thou. From we Thirtain in a factory of the fine in design at at another in the end

for the life in the oil \$0.1 your noted at \$2.2 anished blaced.

-curtance Exemple a minglishmentum, a lipper non esseence? a contract for a minglish and mind of the anish the state of the anish the state of the anish the state of the property of the fore of the fore of the state of the contract of the contract of the state of the state of the state of the contract of the state o

Leve reading of middle order of the contract o

McDonald claimed three items of set-off. He alleged that he has soil and salivered to differ that an annual targets and that he had beened Millett 1800. The engine and the rails were not where the parties were, and the arisence is clear that neither were ever delivered to Millett and never came into his possession, but they appear to have been seized

the jury against McDonald and we are of opinion that the prepon-

derance of the evidence sustains that conclusion.

McDenula sinimed three items of set-off: He aliened that and the sold and sold and solivered to Minsets a sertain angine for .000 and that matter for \$100 and that matter for \$100 and that matter for the callest were not that alivered to Miller and the Miller and Andred the Miller and Miller

on attachment against McDonald. McDonald did give Millett a
check for \$200. McDonald testified that this was money which he
loaned to Millett. Millett testified that he loaned McDonald
this money and took this check in payment. The jury found for
Millett on this issue and the way and the payment. The jury found for
their conclusion.

On the cross examination of McDonald Millett's counsel called for letters of various specified dates, alleged to have been written by Millett to McDonald, and no such letters were produced by McDonald or his counsel. Thereupon counsel for Millett read to McDonald from Exvarious papers which he held in his hand, which purported to be carbon copies of such letters from Millett to McDonald, and asked McDonald whether he received such letters, to which McDonald replied that he did not know or did not remember, and counsel asked McDonald whether various statements read to him were true. This was all done over the objections of McDonald's coursel. Te are of the opinion that the course pursued are highly improper. At that time no one had testified that these were in fact true copies of letters which had seen written and mailed to McDonald, and they then appeared to be merely self serving declarations. No such use should have been permitted of these papers until it had been proved that they were true copies of letters which had been in fact, written and signed by Millett and duly mailed to McDonald properly addressed and stamped and placed in the Post Office. They could only then be evidence in favor of Millett if they appeared to be parts of a correspondence between the two upon the aubjects involved in this suit. Ey reading them into questions their surbstance was placed before the jury before they had been shown to be competent evidence. But afterwards the necessary proof was made to admit these carbon copies in evidence in connection with various letters from McDonald to Millett.

Leffing learning : 'theill' Wilson of the trans since ear moor letters of various e suffica intes, alleas) to lave both initian by Willett to Mofennid, and no losh intrave, are trained y McDonaid or his counsel. The number coursel Tor district ensure on itsitif more states facts in asigns mooned ad of befrome Tonald, and saked WoDonvid whether he received each leave, he instruction and the word for bill ed june boilger alanalob doid ti, of this sameserth suprav thier. Introded being leaduon in ers true. This was all done over the objections of Palaments. the second from the first that the second first the second e. . At thit ties ou one has tasteried they there take in of Lailor the estima area had doing uneited to said occur. -radices thinkness lies giaron on at best-eppe on t you want The ions. Ho-ward mest house ore the character of the structure till it and been proved which "hey are true payer as a contract Lob and been in those without and cagast of Militait and fully a com Office. They could cake then be evidence to navor of lillebb 12 a. sp. a reagon to be parth, as a dominactorismos with the o upon the subjects amronged to this talt. By relair them i s queetions their as butthow and places their just -th The sud accomplise interfaçãos so of name ness ban your .

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The judgment is therefore affirme..

conclude the head arm was one to herefore the above the latter conclusions one of the latter concess of the care the conclusions is incommonly the care all the care the care

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STATE OF ILLINOIS, assume that the second district. Assume the second district.
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

3. December

Gen. No. 6220.

Jewel Tea Company, appellee

VS

Appeal from Pecria.

A. T. Peterson, appellant.

Dibell, P. J.

The Jewel Tea Company, a corporation, hereinafter called the company, entered into a contract in writing with A. T. Peterson to carry on certainbusiness for it in Peoria for certain compensations therein named, and the contract contained a provision that Peterson should not engage in the same business for twelve months after the contract should be terminated for any cause, in the territory in which he worked while in the employ of the company. The employment was terminated on May 722, 1915. Shortly thereafter Petersen entered into the same business in the same territory, and the company files in the enjoin him from so doing and Petersen answered the bill. Thereafter by leave of yourt, the company filed an amended bill on Esptember 15, 1917. On motion of the room in the contract that his answer, filed June (2, 121), to the line of t tal to his never to the school till there the terminal cation for a temporary injunction was heard upon affidavits procented by the respective lattice, but e tellor r, injurtion was granted. The af idavits were preserved by a certificate of evilence. This is, on appear item that order of

The bill shows that the office and principal place of business of the company was in Chicago and that it maintained a branch office, and place of business in Peoria. Its business is buying axi selling and delivering teas, coffees, baking powder, extracts, spices, cocoa and other like merchandise. It sends agents to homes to solicit orders for such merchandise. It has a scheme by which, if a customer orders a certain amount of such goods, the customer receives certain other household

. C. 10 . ol. . neT

Je of Tea Company, appellee

Appeal from Pacria.

av

1. T. Peterson, appellant.

Dicell, F. J.

The Jewel Tea Company, a corporation, hereinafter called the ocum thy, entered into a contract in writing with A. T. . Poterson to carry on certainbusiness for it in Peoria for certain compensations therein named, and the contrast contained senision that Peterson should not engage in the seme business for twelve months after the contract should be terminated for any cause, in the territory in which he worked while in the The Late a west and the paigns and agree you see the Tolines 11, 1915. Shortly thereafter Potersen entered into the same outiness in the same territory, and he company file a ciff to enter him from a foliage on 7 degree of market to sell. lagrafites or leave of coast, the or all a -on Earthware Lay 1918. In a tage of the pay of the community of tut his answer, filed June 38, 1915, to the original bill, - Min and in minimum, and in place who must be particle from a and no fire of a contract of the contract of t presented of the securities without the termination of the termination tion has county. The living area golden and and another . He by first most artime in a total sugartive lo

The bill shows that the office and principal place of Justiness of the company was in Chicago and that it maintained branch office, and place of business in Peoria. Its business withing and selling and delivering teas, colfees, baking owner, entracts, spices, cosca and other like merchanise.

It went agents to homes to solicit orders for such merchanicas.

merchandise as a premium. Its agents have horses and Lagons, and each agent has a specified territory to work in, and when a customer has once been secured, effort is made to retain that customer and to secure future orders from the same purty. Fach agent keeps a bookcontaining the name and orders of each of his customers and some data as to the amount of trade of each customer. Such books also go to the office daily. The bill is very full in details showing how complete a knowledge each agent has of the customers on his route. The contract with Petersen contained the following clauses: "Party of the second part further agrees that on the termination of this contract, or upon leaving the employ of the party of the first part for any cause, that the will promptly tuen over to the party of the first part all books of account, papers, orders and all other property belonging to said party of the first part and used in the business of the said party of the first part.

Party of the second part further agrees that he will not at any time while in the employ of the party of the first part solicit or take orders from or deliver teas, coffees, baking powder, extracts, spices ond cocoa to any of the customers of the party of the first part, for himself or any other person or company other than first party; also that he will not within a period of twelve months after leaving, for any cause, the service of party of the first part, for himself or for any other person or company, solicit or take orders from or deliver teas, coffees, baking powder, extracts, spices or cocoa, to any of the costomers of the first party in the territory in which he Forked while in Tirut placy's a plays on a second of the not to interfere lith the true of the interfere lith the true of the interfere lith. first part as now true (cto) or partial or il it is a case. in said tarcitory chase a laty of the cocond part of on working.

ershandise as a premium. Its agents have horses and wagens, each agent has a specified territory to work in, and when . sustomer has once been secured, effort is made to retain that oustomer and to secure future orders from the same party. To of mile shallow with the most and the stemps and lo each oustoner. Such books also go to the office haily. The bill is very full in details showing how complete a knowledge each ayeart me c? "ha lunto ara on his cout. In our reliwith Poteroun contuders the following allument "Pasty of the scooms (Astainst Line) in the income and the of this contract, or upon leaving the employ of the party of the first part for any cause, that che will promptly turn over to The party of the first part all books of account, papers, orders mali al de vérez d'ha a l'adjuntat princere estés ils ins part and used in the business of the said party of the first .. Jang

Party of the second part further agrees, as a condition precedent, that he will not directly or indirectly through himself or others, take away or attempt to divert any of the custom, business or patronage of the party of the first part with its customers in said territory for a period of twelve months after leaving for any cause, the employ of the party of the first part.

Party of the Second part further agreed, as a condition precedent, that he will not engage either for himself or any other person, persons, or company in the tea and coffee business nor will he offer for sale any tea, coffee, baking powder, extracts, spicesm, cocoa or other merchandise during the life of this contract nor for a period of twelve months after the termination of this contract, for any cause, or after leaving for any cause whether before or after the termination of this contract, the employ of the first party, in the cities of Peoria, Lacon, Henry, Chillicothe, Illinois."

The bill charged that Petersen had full knowledge of the customers on the route which he had and on one other route. and that upon the termination of the contract he entered into the same business and travelled over these routes and solicited trade in the same articles with customers of the company, and sold such customers like merchandise. The bill sought to enjoin him from violation of the agreement for twelve months from the termination of his employment, and alleged two grounds of jurisdiction, namely, that the company could not have an adequate remedy at law, because it would be impossible to ascertain how much trade which belonged to complainant e withdrew for his own advantage, and how much trade he had in the company's locality, and also because Petersen was insolvent, The proof showed that Petersen circulated a business card, in which he described himself as formerly manager of the Jewel Tea Company.

Party of the second part further agrees, as a condition precedent, that he will not directly or indirectly through himself or obhers, take away or attempt to divert any of the custom, business or patronage of the party of the first part with its customers in said territory for a period of twelve months after leaving for any cause, the employ of the party of the farty.

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The bill charges that Petersen hai full knowledge of the outstowers on the route which he had and on one other route, and that upon the termination of the contract he entered into the same business and travelled over these routes and solicited trade in the same articles with customers of the company, and sold such customers like merchandise. The bill sought to enjoin him from violation of the agreement for twelve months from the termination of his employment, and alleged two grounds of jurisdiction, namely, that the company could not have an adequate remedy at law, because it would be impossible to ascertain how much trade which belonged to complainent he ascertain how much trade which belonged to complainent he inclined of the proof showed that Petersen circulated a business card, in

It is contended that the order for the issue of a temporary injunction was erroneous, who was the bill did not pray for a writ of injunction in the prayer for process. The bill contains the following: "May it please your honors to grant unto your crator the People's writ of injunction, to be directed to the said A. T. Petersen, defendant, enjoining and restraining him during the pendency of this suit from" (here follow the details of the injunction desired,) "and your orator further praye that upon the hearing hereof a temporary injunction so issued shall be made permanent." A prayer for process followed. We are of opinion that there as a grayer for a writ of temporary injunction, and that it is not remarks invalid the same paragraph but in the mast.

The order for an injunction provided for an injunction bond ith security to be approved by the clark of the court, where a the statute (Chap. 33, Exc. 8.) requires the security to be approved by the court, judge or master. It is organized the court and reason the injunction or for should be a remaindable accordant to find reason the injunction of for should be a remaindable or the formula that the court who have a reveal by the reference in the court authority. The court along the result is referred to the report authority. The court along the result is a region of the result of the court and proved by the referred to the court authority. The court along the result is a region of the result of

It is contanic; the test sour should not injunction after answer file. That depends upon the nature of the answer. The bill had a copy of the contract attached to it as an exhibit. Defendant answered that it was not a true copy. He did not point out in that respect it was not a true copy. He did not deny but what it was a substantial copy. He did not deny but what it was a substantial copy. He did not deny that it was a true copy as to any part thereof material to this cause.

If is sentenced, because the bill his not pray for a principle of injunction in the prayer for process. The bill contained the following: "May it please your honors to grant unto your cruter the Perperson, lefendant, enjoining and restraining him dering the pendency of this suit from" (here follow the details of the injunction defendant, and the hearing hereof a temporary injunction so issued that upon the hearing hereof a temporary injunction so issued that the made permanent." A prayer for process followed, we intunction, as a serie of temporary injunction, as a serie permanent. The contains the made permanent. The contains a serie permanent.

The order for an injunction provided for an injunction beni with sequelty to be approved by the class of the name, if the tic statute (flug.65. d.c.8.) requires the security to be ap-COVOR BY ... DOURS, BU COMPANIES OF THE TOTAL OR test redion the injury on true four a vitigin and notice test פשה שנוצ הם נתושות כני לוכנים בי לוני בינלים בי לי נוג א to the second of -roper withinfly. The court below can'remedy the lefect upon progen and listian! O'Beirne v City of Elgin, 187 Ill. App. in least to the the court should not are the court should not be the court in the court of the c injunction after answer filed. That depends upon the nature of ti of Ledostate tourings of the contract attached to it as an: exhibit. Defendant answered "hat it was not a true copy. He did not point out in what respect it was not a true copy. No will not say out that it we a most said offer the order In the last I were I daily you be all good and a second daily good to this cause. To regula it proteform any multiplication Leterimret sea of the fortract and the it was terminated

and that he had gone into the same business and sought to trade with the customers of the company, all of the richation of the portions of the contract above quoted. The contract provided that Petersen was thereby employed, not only to take orders for and deliver and sall teas, etc. but also "to perform such other duties as the barty of the first part may from time to time specify and require of him." | The bill showed that during the term of his employment and after a conference with the officers in Chicago, his duties were changed from that of a wagon man and route agent to office duties in the branch office at Peoria. | Petersen contends that that change was an abandonment of this contract and that he was no longer "cund by it and could enter into the same trade in Paoria with the customers of the company at any time after leaving its employment. We are of opinion that the language last above quoted from the contract shows that the / change made in his luties was within the terms of the contract and that he was still bound thereby.

Petersen contends that the bill liveres a contract and its is excission of this contract and its is in the contract and its is in that on or about May 22, 1915. In so since in the payment for one week's salary in advance, "the aforesaid contract of employment of the defendant by your crator was then and there terminated by mutual agreement." Considering this paragraph of the bill in the contract by mutual agreement and the company was ferminated by mutual agreement and not that the written contract was abrogated is an effort to enforce certain provisions of the contract was not in force and not binding upon Petersen, but exactly the contrary.

in that he had none into the same business and cought to trade tish the customers of the company, will of which was in-wickstion of the portions of the contract above quoted. The opntrot provided that Petersen was thereby employed, not only to take orders for and deliver and seil teas, etc. but also "to, perform such other duties as the gurty of the first part may from time to time specify and require of him. " The bill showed that during the term of his employment and after a conference with the officers in Chicago, his duties were changed from that of a wagon man and route agent to o fice duties in entring the definition of the second of the was, an abandonment of this contract and that he was no longer ntiw sinder ni abant emas ent otni retne blucc bas ti yd bauod the customers of the company at any time after leaving its employment. We are of opinion that the language last above quoted from the contract shows that the change made in his duties was within the terms of the contract and that he was still bound thereby.

Paragraph of the bill alfeges the cancellation in that the contract and he is thereby relieved of its object. Lord. The paragraph of the bill intersection alloged that on or about May 23, 1915. in consideration of 137.50, then payment for one week's salary in advance, "the aforesaid contract of employment of the defendant by your orator was then and there "well its clear to us that it means that Patersen's employment of that it means that Patersen's employment of that it means that Patersen's employment of that it means that Patersen's employment to us that it means that Patersen's employment to the written contract was abrogated. The sn'ire bill an effort to enforce certain provisions of that contract was not in that the contract was not that the contract was not

The answer denice that the employment was ac terminated and declares that Petersen was discharged, and that under another clause of the contract he was extinted then entitled to thirty days additional pay and did not receive it, and therefore the company broke the contract and oper assert no equitable rights under it. It dads not appear that he ever claimed any additional compensation or expected that he would be paid anything further, and we are of opinion that the company is not precluded from enforcing the provisions here relied upon by the fact that it has not paid Petersen something which he has not asked for.

Counsel for Patersen suggest that if we do not reverse this order, the temporary injunction will probably remain in force till May 23, 1916, and the company will thereby have all the benefit of a final decree in its favor. It is equally true that the denial of a temporary injunction would practically preclude the company from any equitable relief. Upon the admissions of the answer and the showing made in the affidavits offered by the defendant, as well as by the complainant, we are clearly of the opinion that Petersen is violating his contract and that he should be restrained from so loing, because it is maniplest that the damages which such violation will inflict upon the company will be practically impossible of ascertainment.

The order is affirmed.

Niehaus, J. tock no part.

The answer denice that the employment was so terminated and lectured intersection is the contract he was axxixixi then entitled to thirty lays additional pay and iid not receive it, and therefore the occasany broke the contract and can assert no equitable rights under it. It does not appear that he ever claimed any additional compensation or expected that he would be paid anything further, and we are of opinion in the company is it is contract.

The order is affirmed.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of in the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.
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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk. 200 I.A. 175

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the Clerk's office of said Court, in the words and figures following, to-wit:

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Gon. Mc. 5133.

American Steel & Copper Plate Co.

appelles.

VS

Appeal from DuPage.

H. H. Bilter, et al appellants.

Carnes, J.

On Mat 23, 1913, H. H. Bilter , his wife and two sons, Raymond R. Bilter and H. C. Bilter, the four appellees, living as one family in a residence owned by H. H. Bilter in Elmhurst, DuPage County, Illinois. He also owned a farm of about Let Lores in the same county and was inhebted to parties other than appelled in amounts aggregating \$34,550.00. On that date summons was served upon him as a common law suit by the appellee, American Steel and Copper Plate Company. Four days thereafter for an expressed consideration of one dollar he conveyed, his wife joining with him, all said real estate to said two sond by ased that was July recorded. The common law suit brought by aprelies terminated October 18, 1913, in a judgment against him of \$443.31. Execution issued thereon, and he filed a schedule of his personal property showing a valuation of less than his exemptions of 400.00. The execution was levied on all the real estata so conveyed and absolve filed its bill in equity in this case in aid of the execution. Issues were joined, the cause referred to the caster in chancery who reported the evidence with his conclusion that the prayer of the bill be granted. Objections and exceptions to the master's report were 'iled and overruled, and a decree entered setting aside the conveyance and subjecting the property to the lien and payment of the judgment and executing from which decree this a real is prosecuted.

The swidence shows that the real consideration or some and response was an agreement in writing by the grantess to assume and

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Anneal from Durage.

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. . Eilter, et al appellants.

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pay the before mentioned indebtedness of their father to parties other than a pellee; that the grantess understood that the transfer covered all the real estate and personal property of their fath . Evidence was introduced by imported as to the market value of the real estate from which the master found that at the time of the transfer the fair cash value of 'he residence in Flmhurst was \$6,000.60 and of the farm \$45,005.00 making an aggregate of 51,415.00 Appellace evidence supported the finding, and he evidence to the contrary was introduced except it was shown, subject to objection, that the assessed valuation of the croperty for purposes of general taxation was less than the amount agreed by the grantees to be paid for it, and the grantees testified that at the time of the transaction transfer they arrived at the value of the property by a computation as to its net revenue, and the result was about the amount they agreed to pay for it. The profesty had a market value. Evidence as to the assessed valuation was incompetent and immaterial (Lewis v Englewood Elevator R. R. Co. 223 Ill. 223; Kelly v People's Nat'l. Fire Ins. Co. 181 111. App. 142.) Neither can market value be ascertained by philosophical computations of what property ought to be worth on a basia of revenue. Even on the question of intrinsic value net revenue is only one of acveral considerations. The waster concluded that the amount agreed to be paid by the grantee. was about 45 per cent of the value of the property. A cellants ingeniously argue that the evidence does not satisfactorily lead to that conclusion. It may be, had they seen fit to introduce competent evidence as to the sarket value of the property, it would have appeared that the grantees were agreeing to pay fifty live per cent of its value. The exact ter cent is not very important here and quite likely for that reason appellants did not go further into the matter. There is no question but that iny fair investigation would have resulted in a showing that as

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     ser R. R. Co. 533 Ill. 530; Relly v Paople's Mat'l. Tire
  . Co. 181 III. 1 . 110.) Neither can market value be ascer-
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to approximately half the market value of the property it was a voluntary Jones, and s.

The grantess testified they did not, at the time of the transfer, know of their father's indebtedness to appelled and there is no direct evidence that they did then know of it, although considering the relation of the parties and the assarent purcose to transfer all the father's property to his sons on their a suming all his debts except whatever might be found due from him to appellee, it is taxing credulity to believe that the grantees had no knowledge or notice that there was a suit maing by acceles against their lather. The tree motion arounted to an assignment for the benefit of all creditors except appelles with a voluntary mift over to the assignees at about half the market value of the property assigned. The parties continued to live together under an arrangement, they say, that the father should work for the grantees for his board. It is manifest that it would be much against equity and good conscience to permit appellee to be in this way defeated in the collection of what we must regard a just debt, and we do not think there is any rule of law or equity that should have prevented the chancellor from entering the decree which a common sense of justice demanded.

It is argued by appellants that the grantses paid a consideration for the land; that the fact of relationship gives rise to no presumption of law against the good faith of the sale, and that as a rule to render a sale fraudulent as to creditors of the vendor there must be mutuality of anticipation in the fraudulent intent on the part of both the vendor and the purchaser, and that the burden of proving the conveyance fraudulent was on appelled. These propositions of law are supported.

It is true that a caeditor in failing circumstances may deal with his relatives, and if there are no indications of fraud no presumption arises from the relationship. Schroeder v Walsh

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grantees testified they did not, at the time of the car file of the file of the file for the file of the file and in a no direct evidence that they did the know of it, alternation and the file father. Transmity to his sone un

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It is argued by appellants that he is abtionable private size tion for the land; that the pool relationship gives size on a presumption of the render the good faith of the sale.

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120 Ill. 403 is cited in support of that proposition. But the court said in that case that relationship may excits suspicion and may be considered with other evidence tending to impeach the transaction. Perhaps the rule is that if the transaction with a relative is one that might naturally be presumed if the relation had not existed, then the fact of relationship does not matter. In the present case it cannot be reasonably presumed, the conveyance would have been tade on those terms to one not a relative. The inadequacy of the consideration forbids any such conclusion, and is of itself a strong indication of fraud. It is said in 20 Cyc 441 - "Inadequacy of consideration is a fact calling for explanation, and therefore a badge of fraud especially when such inadequacy is gross." This text is supposed by numerous authorities of Illinois and other states, and is a correct expression of law. It does not matter whether we say fraud in fact or fraud in law, and it may be doubted whether the fact that either or both of the parties were ignorant of this debt would be controlling. If the actual consideration had been the one dollar expressed in the deed, and the grantees had known of none of the indebtedness of their father, the conveyance, of course, could not have stood against such creditors, and there is no equitable reason why it should stand against appellee in this case even if it had been true that the father and his sons :all for rot about the debt at the time the transfer was made.

It appeared that the grantees had paid some of the indebtedness that they assumed in purchasing the procerty, and it is
suggested by appellants that they ought to have been protected
by the decree as to such payments. The answer is that they asked
no protection from the court. We need not here determine whether
they would be entitled to any.

The decree is affirmed.

THE THE PROPERTY OF THE PROPER notoligue effect man quinencialer fact eact and it is to i. the occupiest with other evidence tensing to imposed the e anotion. Perhaps the rule is that if that transaction with -sier and the warminer, of Wildradon this to that one of evita. Lee had not exacted, then the Past of relubiouship does not the present case is commot be calculated necessary. In regance would have been wide on those frame to one and a tive. The inadequacy of the consideration orbide any such asion, .ed it of itesif a strong indication of fraud. . s suid in SC Cyc isl - "Insderuccy of appaidentiion is at os. ling for empanation, and therefore a badge of fraud and a state of the state of the state of the same of t y numerous authoribles of Hilingis and other states, and is a correct exgression of law. It coed not ratter miether we say Traud in fact or traud in law, and it say be loubled status the age that sither or both of the parties were ignorant of this merd and noithwesterned Laute, of the interestion has been true and entirely pit any playment of designing solical and six In antenness of the time of superior and to place to ALTO DISCOUNT OF THE PARTY OF T of reliable bestige Lable Little St. Lib Stibes almost as Mr at large which into bath and large beat for the bath said and ability with all belong with relations of the first self backle because also within a sell in the party and aredding the fail devices at at it was gitter and it gitter too, it streams give her section less force mire avail of days will to de established by the isores as to such payaraha. The carese to this they maked

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STATE OF ILLINOIS
STATE OF ILLINOIS, ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
thousand nine hundred and
Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6182.

Ralph Jester appellant.

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Appeal from Peoris.

David S. Lee, appellee Carnes, J.

Appellant, Ralph Jester, claimed that at the request of David S. Lee, the appellee, he procuped a purchaser of a business recerty of acceles's in the city of Pacria, and was entitled to \$777.50 commissions, and brought this suit to recover that amount. A trial by the court without a jury resulted in a just-ment for the defendant, from which this appeal is taken.

The property in question was in September 1911, occupied by the Minnesota Threshing Machine Company as a tenant of Lee, and by the Hart Foundry Company, a sub-tonant. Jester was not a real estate agent, but was manager of the Peoria branch of the Threshing Machine Company and in charge of their business there. Some questionarose as to the use and repair of the building. Jester and Lee discussed that matter on September 21 or 22, 1911. In their testimony they agreed as to what was said at that meeting and differ only as to the date whether the 31st. or 33nd. In this talk Lee suggested that the Threshing Machine Company ought to buy the property, and Jester replied that he did not think they would buy it but that he intended to visit the factory at Minneapolis soon and he would suggest the matter to them. Les, sither at that conference or thereafter on that day - it is not material which, wrote on a slip of paper the figures #43,500.00 and handed it to Jester was as his price for the property. Jester afterwards went to Minneapolis and saw the officers of his company and learned that it would not buy the property. He testified that he not back from Minneapolis September 27, and thinking that the Hart Company might buy the property, he spoke to Stacy B. Hart, an officer of that company, about it; that

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eid in ewsell's and has bee elloges all of the abtervaritz we to the country. It is a fact that it would not buy that every regular it of that it is a kinnelpolis S. prember of, and the country its great that the country has report

afterwards about September 30 he saw Lee and told him that he thought he could find a purchaser for the property and Lee said all right, if he could he would pay him what was right; that he then told Lee he thought the Hart Company would buy it if they could make arrangements to borrow the money, and Los said all right; that he gave Hart the piece of paper Lee had handed him with the price marked on it and had various conversations (with Hart about it, and some conversations with Walter Wilds, (who was acting in behalf of the Hart Company in the matter, and talked with Lee about it several times, and that the transactions ended in the Hart Company obtaining a loan of Proctor Endowment and punchasing the property. It is true that the Hart Company did but it. The deed of conveyance and its acknowledgment bears date October 20, 1911. At the time of the trial Stacy B. Hart was dead. Walter Wilds testified that Hart called his attention to the antier of the purchase of the rejerty to inuse him the slip of paper with the memorandum of price on it; that he went to see Lee and told him he understood the property was for sale at the price named, and asked if tasy could have credit for a part of the purchase price if they bought it. Lee said no, he wanted to use the money, but that he would sell to them at the same price has had made to the Threshing Company. Whereupon Wilde applied for and obtained a loan from the Proctor Endowment and the trade was consummated. Wilde, testifying for plaintiff says he does not remember having any conversation with Jester about it, but that he got his information with the piece of paper from Hart and understood Hart had been talking with Jaster; he 42 not certain when he got this piece of paper from Hart but mentions a date consistent with Jester's statement that he gave the piece of paper to Hart and interested Hart in the matter after he, Jester, returned from Minneapolis September 27, and at about the time when he say Lee agreed to pay him if he found a pur-

af frif wid wiof the sed that the Co reducing duoce directle thought as could find a pureliated for the property and Lee statir as. tous ald you tiles of fluce of it stigit ile bisc that he tien told bee to thewrit tie Fart Contany would but th LA they could state assents to become a money, and less that leband had end megan, to seeing suit draff erroy of data (tright the in with the united worsers on it was included according to with Mark about it, and some conversables with Talter Wilds, The state of the second disk to be became at another our many salked with Les slout it sayeral times, and that the transactions sd in the Hart Congany obtaining a loan of Froster Enjoyment ్ బాబుబత్తున్నారి. మార్జులు కిందరి కలుకు కి.మీ. కూడా కారణ కారి అందింది. మా . Dug it. The deck o' control and the solmowledment 'este The street seed of the set of the second statement that ROLFSTED BIN CELLUNGTL, USAG DOLFLIGES CALL TELLA - DESEM san mid kaku d kun yansyong sda ka sombonny or ' la maadum sd dos to prove this no estra be remarance out with reque to the la Las und boll him ha whishabet, vis property "ha bull price noted, and using the fary equisionry outsit in a of the purchase that it is sought it. Her trid, no. fr milt sa iis monay, bot that to a cali sa it sa chilate reame order is bad in the the Threething Community Vistraphon To de auglied for and objuined a loan from the freezer Taler and in this constant tea. Thise, trettight in this!! Tifl I nile mortest: voca grant nil tedmo er tem seb en To steel and office appliance but win they and cold dud to the the radial form for the form the factor of the factor of the form of the form of the factor of the f and the pay there is build and the former places (Alicelan The stated the division by the continue time blackers

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chaser; but Wilde sate that he made the application for the loan to the Proctor Endowment after talking with Lee and after knowing that they could have the property if they recoured the loan.

Lee, after stating his first interview with Jester, and his offer to sell the property for \$43,500.00 to Jester's company, said that he never made any other proposition to Jester about selling the property or finding a purchaser for it; that Wilde came to him the day after his, Lee's, first talk with Jester and inquired about the property. Lee stated the conversation substantially as Wilde aid; says that he suggested to Wilde that a loan could be procured of the Proctor Endowment; that the natter was taken up and proceeded to the sale; that Jester never said anything to him about the Hart purchase until October 10 when he came into his office and said sorthing to him about the Hart people being about ready to make a contract for the property that he made no answer whatever to the suggestion, and that was the only time that Jester said anything to him about the sale of the property except what was first said about the Muchine Company buying it. Fach of the parties is to some extent in his testimony. There is a sharp and first conflict on the question whether the Hart Company wire moved by Jester after his return from Mirneapolis on September 37 to purchase the property, or whether they took up the matter with Lee and had it practically arranged before Jester got back from Minneapolis, and befre Jester himself claims he had any authority to act for Lee except to carry a message to his own company of Les's price on the property. There in also a direct conflictbætween Lee and Jester whether at any time Lee authorized Jester to find a purchaser for the property and offered to pay him for it. Under the testimony of the various witnesses and wheir statements of dates as they recollect them, it might perhaps have been found that Jester's statement was sustained by the

. naser; but Milde soid that he make the amplication is the lean start of the lean start they could have the requesty if they recoured the lean.

THE PROPERTY OF STREET, THE PROPERTY OF THE PROPERTY OF THE PARTY OF T n's offer to sail the property for (15,500.00 to Jaster's Trees of sail there, so you had after to the agreement ury, ac. ling the property or fluiting a purchaser for it; bint Wilde come to him the day after his, hee's, first tank with Jester and increased whose the group the state of the conversation advstantially as Wille sid; sage that he surrested to Wille that a lean sould be produced of the Proctor Endowment; test the inter was talen up and proceeded to the sale; that Jesfer never sald anything to him good the Hart purchase until Ostober 10 ents succes wind of paintifice wind ine spills that of mis on a saw y visuatori sur ros generanos e sues on Aprez anose Surse e se se de Arte that he rade no taswer whatever to the suggestion, and that was the only time that Jester enid anything to him thout the of the property except and and first said about the Throning Machine Compley buying it. Then of the parties in corrected toanie har quora a, sa sreal . ynomitaet sid mi tasake enos ou yd bavon swaw ymsgaol dwell and wanterby noddaese edd no teillace Jester after his retarn inca Wi neacolis on Saptember 27 to purchase the proporty, or anthor test up the natter with his had it practronily arranged before Jester got back from -ta gar had on real misself olding had any auawa shi of spaceas a verse to overy a message to his awa of Lie's pride on the marperty. There we also unit of as seems lee and loster in thes and that lee anthorised find a perchaser for the property and offered to pay him wish the testing of the various without the testing . I

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greater asignt of switches but on the fact that the foundry company's written application for the loan from the Proctor Endowment was produced in svidence and bore date September 26. It also appeared that an appraisement of the property was acie for the purpose of the loan, and a written report of that angraisement, which before date September 33, 1911, the appraiser testifying that he was amployed and examined the property three or four days earlier than the date of the report. The dates on these two papers made it certain that the sale of the property to: the Hart Company was practically arranged between Les and Till, before Jaster got back from Minneapoli's September 37, 1911, and before he, himself, claimse that he had any authority to act in the matter. With this unmistakable evidence in the case the natural conclusion is that Lee As stating t's whole matter correctly and is to be believed. It is unreasonable to surpose that after Lee had proctically an an eas a sale to Hert Ercther. hashould contract to key Jester a consistion for fin in a purchaser for the property. The court evidently took this view of the situation and did not err in so doing.

There is some discussion in a pellant's brief about the law of the case, but there is no dispited question of law involved. If Jester is to be believed he was clearly entitled to a finding and julgreat in his favor. I has is to a finding and julgreat in his favor. The last to a finding and judgment in his favor. The plaintiff offers there were the sollaw of the trial. Number 3 was to the effect that if the greater weight of the swidence showed a contract to find a purchaser, and the plaintiff did find a purchaser, and the plaintiff did find a purchaser, and the perchaser, the plaintiff is entitled to recover the usual, ordinary and customary commissions. This the court held. Number 1 contained substantially the same proposition but included a

Direct All perceios or an III mention in Aglicuttique . cany's written appliantion for the loan from the Proster. . . swment has produced in evilence and bore dete deptember 18: 1911. It also appraise that an appraisement of he property or tie for the purcose of the loan, and a minish report of this ruiseasit, abion feet ante Sopha der 23, 1811, the highlier estifying that he was earleyed and examined and proceety ins or four days earlier than the date of the report. The waves un these two capers inside it centain that the sulle of the property to particular the resemble of the particular for the section of at see or fittoatus van bed en tant All the parties and the solution of the said and addition the -rou asijar olodi o s gaitate el set toat el adicitenoc ... = cand is to be deligred. It is unresearched to su poss aredically stronged a syle of the particular areas a syle to Gert Profibers - respectively is a constant of our . Lation or al are son the mother !

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holding that the plaintiff had proved by the greater weight of evidence that he furnished the buyer. This the court refused.

Number 2 contained practically the same groposition as Number 3 except the measure of recovery in Number 2 was stated as whatever the services were reasonably worth. The court refused to hold this. There was no error in either refusal. No question of value of services rendered is involved. There is uncontradicted evidence that such services if rendered, were worth more than the plaintiff demanded either on a basis of usual and custorary charges or of reasonable value of such services.

The plaintiff offered to prove that Les and the officers of the Hart Company were not on speaking xxx terms, and that Wilde had never talked with Lee about the ourchase before the slip of paper was given him by Hart. The court sustained objections to questions calling for these answers, and this is assigned as error. In trials before the court without a jury it is, as a rule, quite as well to permit incompetent questions to be answered and in that was to get into the record, as to sustain objections to the question and let offers to prove met into the record, which last method is necessary in jury trials where the offer to prove is usually made out of the presence of the jury; but we see no error inthis action of the court. There was no claim that Wilde had seen Lee about the matter tefore he got the slip of paper, and one would understand from his testimony that he had not, and whether he was friendly or unfriendly to Lee he certainly did go to him and negotiate the purchase ax of the progerty. Finding no error in the record, the judgment is affirmed.

Alfilmie...

Nichaus, J. took no part.

int ine plaintif had proved by the relater valget of that the test to buyer. This the court refused.

The test accordined practically the same proposition as Mander 5 accept the according in Mumber 2 was stated as waster accept the according to Mumber 2 was stated as waster accept the according to the test accept to the test of acceptance of a basis of acceptance according observations of reasonable value of services.

registati f offered to prove that Lee and the officers the Hart Company were not on apeaking stam terms, and than 11de had asver talked with Lee about the purchase before the ... Lo of pager was given him by Hart. The court eparainsh ocics-Luns to questions sailing for these answers, and this is La-I ned is error. In trials before the sourt without a jury it as a rule, quite as well be permit incompetent questions 'e answered and in that walk to set into the record, as to enaof all the every of arelle that he motified and of anotheride ni t a record, which leat method is accessary in jury trials re the offer to prove is as ally made out of the interior jury; but we see no wreer inchis action of the court. Thure af profes weather est tooks and ask had shift that misio on . slip of caper, and one would understand ron his rathiy that he had not, and suther he was friendly or units mily Is he certainly did so him and negothers the oursines as the growarty. Finding no error in the recorn, the fungeresh is .Louri

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk. 200 I.A. 200

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 8 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 6193.

Laura S. Thompson, Pltf. in error.

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Error to LaSalla.

Ancient Order of Gleaners, &c.

Deft. in error.

Carnes, J.

The defendant in error, Ancient Order of Gleaners, is a fraternal beneficiary society of Detroit, Michigan, A local arbor was formed at Ransom, Illinois, in 1909. John H. Thompson the husband of plaintiff in error, was a sixter charter member of that arbor, and a benefit certificate for \$1,000.00 was issued to him June 4, 1909, payable on his death to his wife. He met his leath by an accident October 19, 1900. His miles brought this action to recover on that certificate. On a trial by the court without a jury there was a finding and judgment for the defendant. The plaintiff brings the record here for review.

One defense relied on is that the insured was before his death suspended for non payment of dues and assessments and therefore was not at the time of his death a member of the order, The "dues" were payable quarterly, and one of the payments became due May 30, 1910. There was an asse sement, number 90 the last day of payment of which was May 30, 1910. It is not claimed that he made either of these payments at that time. Under the laws of the society the failure to pay dues or assessments operated as a suspension of the member, but it was provided that he might within thirty days, be reinstated by furnishing a certificate of good health from the regular arbor physician, which must be passed upon by the supreme medical examiner, but that after thirty days from the date of suspension he is beharred from further reinstatement. It hannot claimed that the insured made any effort to be reinstated until the last of August 1910, but it does appear that he then went to Henry Siedentop, the secretary and treasurer

. ra S. Phomison, Plb., in seroes.

Moreo to Lagalle.

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Amoient Order of Oderners, ic.

Diff. in error.

Carnes, J.

The defendant in envoy, Anniens Orner clodianners, is a fraternal baneficiary acciety of Detroit, "Goldian, A local arter was formed it Ennaces, Inlineis, in 1916. John II. Thompson the hereand of plaintiff in error, was a shrifter canber of that arbor, and a sensite sertilicate for "1,000.00 was issued to that arbor, and a sensite sertilicate for "1,000.00 was issued to him June 4, 1808, paydoleron his leath to his wife. He got his death by an accident October 18, 1820. His wifes brought thing to recover on that sertilicate. Or that sentilicate is the sentilicate.

ne defends relied on to that the insured was refore he anaporated for non payment of dust and assessments and there was not at the tire of his leach a case of the payments become the "Augo" were pryable quarterly, and one of the payments become a lay 30, 1910. There was an asse seasont, number 90 the last tip a lay 30, 1910. There was an asse seasont, number 90 the last tip a separate of thish was May 30, 1910. It to not alaimed that he made either of these yayrents at that time. Water the last of the seciety the failure to pay has or assessments exprated at aurgencion o' the character, but it, as revised that he might ditty days, be reincented by furnishing a preficient.

range ... it is it is 1000 to take the contract to the contrac

o the local order, and offered to pay him the delinquent assessments and duss, and asked to be coinstated without furniching the required local physician's certificate; that there then was no local physician, but deceased was told that the company would accept the certificate of another physiciam, naming him. Siedentop applied to the company to reinstate him under those conditions, and the application was refused. Plainti'f claims, and there is evidence tending to support the claim, that the insured paid Siedentop the money required to gover the Jelinquent assurements and dues. Siedentop testified that the insured did not pay him any money but offered to pay him, and he told him he would do the best he could for him, and report the dues paid, but he did not think he could in 'hat way be reinstated and would not take his roney until he knew more of the matter, or something to that effect. The court was admirantly justified in findia. Siglantople statement of the transaction true. Under these facts Coosaged wis not a member or the defendant society at the time of his death. His failure to eav dues and assessments automatically susjended him. He could not become reinstated without complying ith 'he requirements of the order unless somebody with authority waived those requirements. And even were it to be found that fiedentop, as secretary and treasurer of the local order, received these Jues at the time of the requested reinstatement, still there is no ercund for claiming that it operated as a reinstatement. It is clear, whither Siedentop took the money or not, he advised deceased at the time that it was doubtful whether he would to reinstated and it must depend on the action of the superior officers of the company. National Council v Dillon, and Itl. Jac. Scheiber v The Protected Home Circle 146/111. Aug. 874.

The contract of insurance in this case, as is usual in such societies, included the constitution and by-laws of the society

-casees thepaids all this pay it becare and take land early mente and luce, and asked to be calletable vithout furniching the required local physicin', parililents; i'at them wis no lossl physician, but iscensed his told that the company would socspt the sertificate of facther physicials, and ing him. Siedentop applied to all sompany to reinstate him under those con-Market and the Lord Hardward Company of the Company there is svidence trading to surport man obtain, that the insured paid Sielenton the roney re quired to cover the lelineuent wassesfor bic barneni ta: fant bailiters gotnetail asai bar atnea ray him any somey but offire as to say him, and he told him he weell do the best he could for him, and report the duce paid, Dat he did not think he could in that way be reinstruct and would trinida es to projekt and la promisión el litau year sid edet fou AND THE RESERVE OF THE PROPERTY OF THE PROPERT Malenary Land ---- -- The State of the State mile and the grain of this bit as the street of the street all pulses the state of the cold and the col suspended him. He could not become (sinstrated rithout complying with the requirements of the order unless somebody with authority -eight into ed of the erem nave balk interest to be found that Sielentop, as secretary and bransurer or the Booml order, received. these tues at the time of the proquested reinstatement, whill -education is an Foresteen of the transfer into the contract of the contract o ment. It is elear, whither Wiedentop wook the money or not, he sit is the that the time that it was doubtful whether he would religence on! o mother thy ho wregot team, the we betweening of THE ART OF THE PARTY OF THE PAR Calcader V The Protected Hora Circle 146/111. Ann. 874.

The contrast of insurance in this case, so is wound in such

at well as the certificate. The certificate was offered in evidence by the plaintiff and treated as making a prima facie case. It a necessity to the resumber to set in evidence the constitution y-1 ma, an various notices an documents. Foresseing this escentity, to Defendant took the deposition of some of its superior c ficers and propounded various interrogatories as tobooks, documents and records, and copies of same that it wished to use in evidence. The plaintiff did not appear at the taking of the deposition, and objects here that a sufficient foundation was not laid for the introduction of the svidence. Before the trial the plaintiff moved to suppress the deposition. The court overruled "he motion, but defendant stating in substance that it would rather re-take the deposition than have any question in the record about that, stipulated that no error should be assigned on the action of the court in overruling the motion to suppress. The record therefore at mas as though no such motion had been rade. The plaintiff, on the trial objected to various questions and answers and moved to strike out the evidence, which objections and motions would probably have been sustained as to some of the material proof if the evidence had been offered orally in court; but such objections to questions and interrogatories cannot prevail if first made on the trial. Thise is an old familiar rule and was applied in Hutchinson v Bambas 249 Ill. 624, where the proof was insufficient as to the loss of letters, the dontents of which was offered in evidence. In I. C. R./R. Wo. v Foulka, 191 Ill. 57, where the answer of the witness was improper as a statement of a conclusion instead of a statement of fact. In that case the court cited with approval Balkwill v Bridgeport Wood Finishing Co. 63 Ill. Ap. 665, where the rule was applied in cast of insu florent svidence that a certain day was a legal holiday. In that case, citing T. W. & W. R. R. Jo. w Embleray, 54 III. 19, Where, without stating the nature of the interrogatories and answers passed on,

y the plaintiff and treated no varior a princ facie case. It Bullians and another of the Bullian street question at association of some to the despoition of some of ite superior officers and propounded various interversitation is takeoks, decyof any of particular for heart training religion for account ing address The parties of the pa , sition, and nojects hare that a real istent foundation was Lates was been a locality to a select the rest of the late of the late for the plaintiff moved to suppress ind isposition. The court overrules the motion, but isfendant stating in substance that it would troper and ni moifeany que aman mant moitieogel ent exad-er redtar about that, stipulated that no error obquid so assigned on the The court of the c Laborated Call Laboration Continue Special Artistants and Contact Reserve The plaintiff, on the trial objected to various questions and the rear Tonge legacy have been suctained as to some of the raterial apparent -do doue tud jaruos at gilaro teretto aned ted sometive ent li Millians of the confidence and the confidence of the confident Tage the size talling the court as a second restrict and process to 225 and the former to be all the anger w mountained at the former new doubt to atmostate and parestal to each on to the factofication offered in svidence, In I. C. R. B. Vo. v Youlin, 181 Int. 37, as to drawer that g/sa grown is san it read in any two mawers and enem topic any ears made it which the drawled of a do padrent code success THE REPORT THE PROPERTY OF PERSONS ASSESSED. It. There the rule was applied in tas, but insufficient .coco t. if at a state of the coco a feet of the

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the court said it is not the proper practice to make objections to depositions on the trial of the cause. They should be made and disposed of before the trial in order, if defective, the party taking them may have an opportunity to remedy the objection, and for such purpose ask a continuance. Statements that are objectionable merely because they are secondary evidence must be objected to before the trial. Cooke v Orns, 37 Ill. 182; 13 Cyc. 1020. It is of course true that certain objections to interrogatories and answers may prevail if first made or the trial, but we think the matter complained of in this case is substantially all within the rule that requires objections to be made before the trial. There is no reasonable presumption from the record before us that anything of the kind got in evidence that could not have been easily made competent by a re-taking of the despotishien if the questions and answers had been held bad on the motion to suppress. We therefore will not discuss the questions raised here as to the competency of interrogatories and answers that should have been first raised on the taking of the deposition or on the motion to suppress.

Another defense attempted was that deceased made false warranties in his application as to his habit in the use of intexicating liquors, and it is claimed that he came to his death because of intexication. It appears that his widow, the benegiciary brought an action against salcon Respers under the dram shop act for causing his death. The record is not sufficiently abstracted on this question to fairly present it, and while the defendant discusses the question here, it does not clearly point out the parts of the record that he relies on. We regard the proof so clear on the other ground of defense that we have not examined this question.

Propositions of law were offered on the trial and marked held

Another defence attempted was that deceased made false warranties in his aeglication we ic his habit in the use of incating liquors, and it is anticed that he came to his death because of intentiantion. It expense that his stion, the heavyficitry brought an action against asleen less, as not ensure the draw thep not for causing his death. The record is not cufficiently abstraces?

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The classing continue the record that he record is a continued of the record that he relies on. We record that he record that he relies on. We record that examined at the other ground of a sense that we have not examined and the other ground of a sense that we have not examined.

metion to suppress.

Alac . whis the Leitt of the Laratto arew wol to enoit, or or

and refused by the court. We find nothing in the court's action in that regard indicating any view of the law less favorable to the plaintiff than we have before expressed. Finding ac error in the record the judgment is affirmed.

Affirmed.

red by the sourt. We think nothing in the sourth subject of voluments in the second indication and view of the law level lawership to another organizated. Thinking no coror in cord the judgestia is all threed.

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CINAME OF ILLINOIS
STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine bundred and
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice O T A 2 C S

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

RHDru app 6/16

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6199.

Dan. J. Curran, et al appelless.

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Appeal from Knox.

A. H. Junk, westernt.

Carnes, J.

Plantiff L. A. Alice D. Ourran, lawyers, owe.

real estate brokers, leist business as Curran & Curran, as Tacomb

Illinois, husb ad and ifs. The commissions in producing an accomb

J. H. Junk, the cellant, for commissions in producing an accomb

change of his term of 1380 acres in Minnesota for a livery stable

property in Ottumwa, Iowa, belonging to Bosserman Enothers. On

the total, at the close of the visiones, the rount, by consents

the counsel, instructed the jury if they ound for the coleintists

Sugar have entered thereon, from the latter as eal is presented.

The declaration consisted of the common counts with an additional count in the form of a common count alleging services rendered in exchange of real estate and personal property. The general issue was plead with special pleas alleging that pending the negotiations in the real estate deal in question there was an agreement entered into between the pl intiffs and defendant that the plaintiffs should effect the exchange of the property in question, and should further, within thirty days, procure an suchange of the Ottumwa property for farm lands in Rock Island County, Illinois; that the agreed compensation to plaintif for the whole matter was \$3500.00 due when the whole transaction has completed and not before, and that plaintiffs had failed to procure the exchange for Rock Island County farm lands. It appetred in evidence that a lant, he had nev r it - cos, wrote them on November 10, 1913, that he had two sections of land in Moore County, Minnesota, that he would like to exchange for xxx other property, and in the correspondence immediately folnoni sori Lusya

T. H. Junk, argellint.

was traffic to the manual towns of the grant of the control of the

roberty in Obbume, Iowa, or curing to Besserman Inchers. Los

The declaration consisted of 'he common counts with an ai-Milicaal sount in the form of a cormon sount alleging services rendered in exchange of goal catate and personal requesty. Ins general is sue was plead "lith special pleas alleging that pending the negotiations in he real satute deal in question there was an agreement tatter in the new manufacture and contract the members and that the products should effect the property in juestion, and should further, ithin 'lifety days, product an exchange of the Ottuary arctarty for farm lands in Pook laisns County, Illinois; that sersed commensation to thintiglis for the chois matter was 1000000 due when the whole trepositor of belief and allibrately that his grainfile had failed be -y fi.ekn.1 ark. ydruod Count Roya rok sgmandre sift erucorg Ted in evilance that organization the hear mover or proseduces rote them on Movember 10, 1818, that he and two sections of - - - m Moore County, Minnesots, that he would like to enclungs

lowing this letter he named a price of #100.00 per acre on his Junt Lim a description of the livery stable property in Ottumwa, Iowa, valued at \$75,000.00 to \$100,000.00 that was in the market for such an exchange. After further defendant correspondence appealant, concluded to o to I was ad investigate the matter, und & wrote him on Dacember 1, 1815, sur estina manner of meeting and taking the journey, and saying they would look to him for commissions at \$5.00 per acre on his Minnesota land in case the deal was consummated. Dan Curran testified that on December 5, he had a telephone communication with a tent in which he, appellant, said the commission terms were stisfactory. Junk denied so saying, but Curran socorroborated in his testimony by his wife who was in the room when he was talking over the uphone and states what he said in the conversation. Arrangements were made for meeting the cawa parties, and Dan. Curran went to Ottumwa and met appellant and those parties at the Ballingall Hotel there December 6, 1913. They looked over the property and came home without effecting any bargain, but immediately thereafter accellant wrote appelleds that he had been considering the matter and a trade might be consummated if "you cut your commission in two deformational making it \$3000.3 Two or three days afterwards and allent telephoned Dan. Curran to meet the Iowa parties at an hotel in Galesburg, Illinois, and on December 9 they all met at that place. After considerable negotiation an article of agreement was that day prepared and signed, stating the proposed terms of the transmitten transfer and giving each party a stated time to examine the other's property and approve the contract. December 11, appellant and Dan Curran again went to Ottumwa, Iowa, where there were further negotoations. They returned home, and on December 17 a relant acce he mentions spelled offering to approve the agreement if appealess would take as commissions \$1000.00 when the deal was closed, \$1000.00 when they disposed of the personal propertym and \$1000.00

int, vy andice vilus and interest of the state of the sta reddiol with agreeous as doug roll textre . set it and their correspondence well-shap concluded to no to Ious, and ious stirate e mitter; and same same into this controcaber i, 1910, any sating noer of masting and taxing the journey; and saying they tour of to him for scentialions at 185.00 per agre on his listators. your pullified party will be with the fact that they be been on Desember 5, he had a telephone sommunication mith associant it - the series of the commission terms were softenotory. Just Senied so saying, but Curran te corroborated in his testimony inchy fodd tavo gniddiod out the med moor old the new olde all. all the property of the property of the party of the second of - Heat those parties at the Ballingall Hotel there December S, 1812. They looked over the property and came home without of legiting our heresin, but it we stately the scouter conclient considering the and accommidering the estter and a trais might be consumnated if "you cut your commission in two what some attended as your to sell the sell of the sell of proceed Dan. Curren to asst the Tone parties at an hotel in Calesours, Illinois, and on Dassager & they all met at that place. ter considerable negotiation as article of agreement tas that day endingsom style seed than the little absorber in Library * trinto ent animane of emit lateta a grand dua triti ina tala: the designation of the state of AND DESCRIPTION OF THE PARTY OF o potentions. They returned home, and on December 17 annualist 4 the company of t is standaring to acrove the agreement if supporting THE E I WE LESSON WHEN THE BOOK AND ONE OLO THE

when they should dispose of the Ottumwa real estate. Appellees answered this letter under the same date, discussing the past transaction at length, referring to the terms as to commissions first proposed, and refusing to vary them. Appellant answered the next day by letter, saying that the commission was too much and that he would not go on with the transaction. A day or two thereafter clless wrote him enclosing a letter from an Iowa party who was talking about buying the Tows property, and shortly after mrds Dan Curran met appärlant at an hotel in Galssburg Illinois, and Curran says they then again discussed the matter of comappellant, asked if they would charge a further mission and commission for disposing of the Iowa property. He told him they de la manuit culd, and that appellant said to go ahead with it, he would gay the commissions all right. Afterwards, January 19, 1914, the parties again, met at Ottumwa Iowa, and closed the trade. Curran testified Junk there again, before the trais was closed, told him he rould pay the commissions if the deal went through. On their breant, said Curran , 500.00 to a ply on comissions. less were endeavoring to dispose of the Iowa property for eppellant and there was some correspondence about that. They erlant letters on Tabruary 7, March 4, March 24, and April 11 demanding further payment on commissions, which met no response and no claim that no commission was due, though Junk 31d write them on March 38 urging them to do something about the sale of the Iowa property.

There is no claim that accelless did not work fairly and faithfully for appellant, or that there was any fraud or wrong or loss in the transaction, but appellant testified denying any agreement to pay the original commission charged, and saying that at the time the trade was consummated there was an agreement to tween him and Dan Curran at the hotel in Ottumwa that as should trade him in and trade him out of the property for \$3500.00

then they should dispose of the Ottunwa real estate. Appetheser Laswared this Ister under the same date, discussing the cast tran. action at langth, referring to the terma as to completions first proposed, and refusing to vary them. Aspellant enamored the next day by letter, saying that the commission was too much and Telest left not so on with the transaction. A day or two thereafter ... Less wrots hir enolcuing a letter from an Town party who was talking about buying whe week property, the theethy after ards Dan Curran het appellent at an hotel in Gelebourg Illinois, and Curran says they then again discussed the matter of comwinderung angelede filmir winder it hadaa, teallagin dan matemin commission for disposing of the Towa property. He soud him they ilinet said to go shead with it, he would' - 🧓 e tait tak blucw the sommissions all right. Afterrards, January 18, 1914, the parties againgast at Otturwa Iska, Taba closed the trade, Curran mfd feldy transfer am openy city and bud trans and apply the it the of exterior for and the modern prove the greatest and itent paid Curran ,500.00 to apply on semmissions. see were andeavoring to dispose of the lowe property for Child Albert 1 Hallin Bost Programmed Title Hot Losse Lutrers on Fourtury 7, March & March Sa, and April 11 deranding further payment on commissions, which get no response and no claim that no commission was due, though Junk Ald write them on March 28 urging them to do something about the

There are no claim that experience did not work hairly and faithfully for expellent, or that there ... a new (roud or mong or loss in the transaction, but expellent testified lengths any senset to may the criginal countration obarged, and raying that the the trade was consumented there was an agreement had the him and Dan Curran at the hotel in Ottunwa that expellent

sale of the lowe projerty.

and that nothing should be paid until the whole transportion was somplete. His testimony differ from he plan in not confining the trading out to trade for Rock Island County lands.

This laft a sharply contisted quastion of fact for the jur to determine. We conclude, from a reading of the evidence in the record, that the jury were not only justified in finding that Currants original proposition of \$5.00 an were as sormission was accepted by appellant, but they could not reasonably reach a different conclusion. The question still remains whether different terms were agreed upon as testified by appellant at the hotel in Icwa on the day the contract was completed. The testimony of appellant is very clear that there was, and of Dan Curran equally clear that there was not. The fact that appellant immed listely after hat assting caid Cur an 500.00 to a gly on commisalons cartainly loss not support his theory that no commissions were to be paid until the Iowa property was disposed of, and his failure to answer subsequent lettens from appelless deranding further payment on commissions by climing that no commissions were due, seems inconsistent with tha claim he is now making. We are entirely, satisfied with the vertict of the jury on that question, therefore the judgment should stand unless the record Siscloses material error of law.

Error To assigned or giving, refusing and modifying instructions. Plaintiffs' sevond given instruction informed the jury that the burden of proof was upon the plaintiffs to show a contract for commissions and that the contract, if so shown, stands until a recision or change is shown, and that theburden of proof is upon defendant to show a recision or change. We see no substantial objection to this instruction, but it there is not upon about it it is reserved by the jury are told it say believed from the party are told it.

and that nothing seculd be paid that the mode translation was your first that the complete. His testimony different his plan in not forming

the trading out to trade for Rook Island County lands. This left a sharply contested question of feat for the jury to determine. We conclude, from a reading of the evidence in the ten' calcult in the fury wars, not enly junctified in finding C. : was original proposition of (5.00 an wore as commission Meser yldenosery for a lock they but they acute not beingers as a a different conclusion. The tuestion still rimains whether fixferent terms ware arreed whom as testified by enhaltent at the hotel in Icwa on the day the contract was completed. The testtimony of appellant talvery clear that there was, and of Dan furram -mail lasting that you sell along the mail fall the last of the sell of the se diately efterthat meeting raid our can (BCC. Oc to argly on normisaions certainly , foes not support- his theory that no ocumissions sers to be gaid Entil the lows property and disposed of, and his indicated and the fact of the Party and the party of the further payment on commissions by ciriming that no commissions ere due, . seems inconsistent with the claim he is now making. Late we have not the follower on this particular question was et . tion, thangfore the julgment should beand unless the record Loses material error of law.

Error de asoigned o giving, refu ing and modifying instruclond. Plaintiffet sevend given that ruction informed the jury that
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for commissions and that the contract, if so shows, there until
a reciation or change is shown, and theburden of greet is usen
fendant to show a reciation or change. The section of change.

the the tary were told if they believed from a preponderance

of all the evidence that facts (reciting them) claimed by the plaintiffs, then, unless they further believed from a preponderance of all the evidence that the contract with reference to commissions was rescinded or changed by the consent of both the parties thereto, they should find for the plaintiffs. By the next instruction they were told, in substance, if the criginal contract relied on was proved by a preponderance of the evidence properties and the accentation were ifterwards exchanged by the defendants through the plaintiffs as real estate brokers under the terms of the agreement entered into with reference to commissions, then the plaintiffs are entitled to recover "unless you believe from a preponderance of allthe evidence in the case that the said contract was afterwards mutually rescinded or changed."

By defendant's first given instruction the jury were told that if they believed the parties had a contract for commissions still, as matter of law, there was nothing to prevent them from making a new and different contract at a different time, and if they believed from a preponderance of the evidence that they did make a new or another or differentcontract in respect to commissions, then the new contract would take the place of the first or original contract. This instruction very fairly presented to 2 . = - + the jury the controverted susstice. Applicant offered other inobjections which in ountry only to an amplification of the rule that the court has it ited to the jury about a subsection to different gentreet, stating in detail if they believed there was an agreement between plaintiffs and defendant to trade the Iowa property for farm lands in Rock Island County, Illinois, "or elsewhere" and the undertaking was not performed by the plaintiffs, then they could not recover. The court struck out the words "or elsewhere" and this action be defended by appelled on the ground that it was a departure from the pleadings to instruct the jury that there was an agreement to exchange for lands elsewhere than in

Islatifies, then, while of they, further believed from a prepositive nose of all the svidence that the contract with reference to ness of all the svidence that the contract with reference to ness of all the svidence that the contract with reference of both the parties thereto, they about find for the printrailie. By the parties the truetion they were told, in substance, if the original contract relied on was proved by a proponderance of the evision properties

through the plaintiff. Est roul, arther there water the terms of the agreement entered into with reference to commissions, then a plaintiff are entitled to recover "united you believe commissions, then a plaintiff are entitled to recover "united you believe commissions.

By isfectant's (trat given instruction the jury sere teld tant if they believed the parties had a contract or commissions still, an eatter of law, there was nothing to prevent them from making a new and different contract at a different time, and if they believed from a preponderance of the syttemes that they did -aim to ot toogear at teartmoothereille to redtom no went elem sions, than the new contract would take the place of the first or religional montesets. This instruction is a first And play were well that the constitute A select that The Man State of the State of t West for the control of the control -terms at a seri levelled year it it is no gattete at each ment between plaintiffe and defendant to trade the Town promoting for farm lands in Rook lilling County, Ellinois, "or clas lead" and the uniority was not performed by the plaintiet, the ould not recover. The ocurt struck out the cords "or lasthers"

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Rock Island County. It one think this notion of the court is justified on that round because it may jie make a rater and different agreement we presume it meader ribbe, under the year ral issue. But se that as it may, the jury had been several times clearly and definitely told that if there was a later and different agreement made the plaintiffs could not recover, and it was entirely unnecessary to give these instructions, and consequently not reversible error to so making them. The court refused other instructions of ered by the defendant which we have examined and regard properly refused. There were no difficulty questions of law involved, and insofar as it was necessary to advise the jury about the law governing the subject, the instructions given fully served the purpose.

The motion for a new trial was accompanied by an affidavit setting up newly discovered evidence, but not the affidavit of the witness whose evidence had been discovered. A motion for a new trial founded on newly discovered testimony should be supported by the affidavits of the witnesses by whom it is proposed to prove the facts relied upon, or some excuse should be shown for not obtaining them. Janeway v Burton, 201 Ill. 78. But aside from this there was nothing of importance in the newly discovered evidence.

There is no question about the amount of the verdict.

As we have before said, the jury, by agreement of counsel, were instructed if they found for the plaintiffs to render a verdict for that amounts, therefore, if they found anything the tree the defendant to the plaintiffs they had no choice but to adopt those figures, and neither party could complain. The judgment is affirmed.

ent agreement we presume it we exist withing the funy had been several curificatly and Sefinitely told that if there was a later and sent agreement whis the pinintills sould not a cover, and atly not reversible sayou to so modify them. The sourt is exist instrableas of the adendant which we seemined and regard properly refused. There were no ifficult questions of law invol and instrable as sure in the order of the distance of the security refused. There were no ifficulty questions of law invol and insertar as it was necessary or advise his tury about the law governing the subject, the nations rives inity served the currees.

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As we have before said, and jury, by greened of counts, were
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for that emounts, therefore, if mey found anything was fro from
the aeftedant to the plaintiffs they had no emotes but to stopt
the aeftedant to the plaintiffs they had no emotes but to stopt
the aeftedant.

STATE OF ILLINOIS, SECOND DISTRICT. SS. I. CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, no hereby certify that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Cl. 1 . C. I A II A Const

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk. 200 I.A. 224

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the Clerk's office of said Court, in the words and figures following, to-wit:

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Reichtreiß bis SWMST bill von BKM in der eine Bische der eine Bische Bis

Gen. No. 8308.

City of Peoria, appellee

Va

Appeal from Peoria.

Western Union Telegraph Co.

appellant.

Carnes, J.

This is an action by appelles against the Wastern Un...

Telegraph Commany, of the same kind and character as its suit against the Postal Telegraph-Cable Company, in which we file an opinion harewith. (Gen. No. 6207) The same counsel present the case here, and practically the same questions are raised and argued. For the reasons stated in the opinion in that case the judgment is affirmed.

A Tilled.

Nichaus J. took no part.

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i el Paonia, any siles

Angent from Picina.

rn Union Telegraph Co.

All agreements

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taus J. took no purb.

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STATE OF ILLINOIS, Second district. Second District. I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
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Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk O O J. A.

E. M. DAVIS, Sheriff.

TH Drie april 6.1916

BE IT REMEMBERED, that afterwards, to-wit: on
the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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THE TO PETER OF A RESPECT TO A

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Gen. No. 6109.

John H. Gibson, appellee.

va Appeal from City Court Storling.

Wennie G. Pit og, terminant.

Niehaus, J.

the a salant a written contract :ith of June 1913, by which the sa agreed to convey to the elleb, by warranty deed, a farm. with a dwelling house thereon, the county of Whiteside , in consideration of the payment appallac of \$18,000 as follows; \$300 cash in hand; \$1100 in a note made by J. W. McCready, to be endorsed over to appellant; and the balance of the consideration to be sattled by a saide, at the time of the delivery of the deed to him, on March lat, 1914, by making a further payment of \$3700 and by giving another ...tt age on the premises, for \$4975, with interest at 5% per annum It was expressly agreed, in the contract, that appellant would deliver to appelles a warranty dead, and give him possession of the oremises on March 1st. 1914; the premises to be as good condition as they were at the date of the contract, ordinary wear and tear excepted.

At about the date fixed by the contract for the delivery of the deed and the possession, are allowed went to arrailant, who was eashier of the First National Bank, at Sterling, Illinois, and demanded of arrailant, that he carry out the terms of the contract, by delivering to him the deed and the possession of the promises; and offered to perform his part of the contract, by paying the first possession for the juries; and offered to perform his part of the contract, by paying the first possession for the juries; and it is cossession for the juries; and it is cossession for the juries; and it is a cossession for the juries; and it is a cossession for the juries; and it is a cossession for the contract. It swills to the delivery

. . . Asgura imos City Gourt Vocating. 5.73 .i. Planing n. sellu. i. • Ŭ . = ARREST TO SEE THE SECOND SECON , by marranty dead, w firm, with a dimiliant house thousen, Let sounty of Thitspide, in consideration of the page no Soft; frace of quee 608; families av 300'81; je ್ರಿ ಸಂಪತ್ತಿ ಬರು ಬರು ವಿರಾಜನಿಗಳು ಕರ್ಣಕ್ಕೆ ಕ್ಷಾಪ್ರಿಸ್ ಕ್ಷಾಪ್ರಿಸ್ ಕ್ಷಾಪ್ರಿಸ್ ಕ್ಷಾಪ್ರಿಸ್ ಕ್ಷಾಪ್ರಿಸ್ ಕ್ಷಾಪ್ರಿಸ್ ಕ್ಷಾಪ್ರಿಸ್ ಕ್ಷಾಪ್ರಿಸಿಕ್ ಕ್ಷಾಪ್ರಿಸಿಕ್ ಕ್ಷಾಪ್ರಿಸಿಕ್ ಕ್ಷಾಪ್ರಿಸಿಕ ಕ್ಷಿಪ್ರಿಸಿಕ ಕ್ಷಾಪ್ರಿಸಿಕ ಕ್ಷಿಪ್ರಿಸಿಕ e briance of the consideration to be estical by to secrets, ites of the islivery of the assist to him, on Surph lat. by saking a further payment of 3760 and 1 y 91 ing assence ಷ್ಟತ ರಣ ಕೆಟರ ನಿರ್ವಚಿತಿಕತ್ತು ಿಂತ ನೀತಿ?3, ಇತಿಕೆಗಿ ತೆಗರೊಂದು ಕಿ ರುಕಿ 3್ಸ್ ಪ್ರಕರ್ ಎಸ್ ಗರ್ಣ, th was organisally agreed, in the contract, thus one offers to have a warranty deck, and give his possession of . . presises on March let. 1914; this premioses to be seen fiften of the ware at the Cake of the contract, credinary nd tamm exocorel. At about the sate fixed by the contract for the helicity will write I s deed and the reasonation, a postous tent and states of the Signif Sational Same, at Surfice, Thincir, and (accimum, odr lo noitreseso, at the dead ent min of gairsvit. of effered to perform his part of the centract, by raying the office which he hed brown from the Etterling Estend Frak, and had the fact the set gain rather of the tees and take and motores.

Beninger s. (2001) to introduction said and engine on low a

was ready to deliver the warranty deed, but practically admitted

that he could not carry out his agreement in wegard to giving

fine the possession; and it appears from his own testimony, that

he proposed to obtain for appears, some other dwelling house

to occupy, until he could put him in possession of the dwelling

house on the premises in question; which of fer appealed refused to

accept; and thereucon the appeals declared the contrast at an

end, and demanded a return of the part of the consideration

which had been paid to appealant; appealant, refused, and appealed for

commenced this suit to recover the sum paid.

The tries resulted in a verdict in Tavor of the less, for location, then was the arount a coived by a perlant, and required instruct; he court remiered judgment on the vertical. Then upon that under the facts presented in evidence, appelled had no right to recover; and that the evidence fails to show, that appelled flamily tendered performance on his part, or a willingness and ability to perform; or that the actual performance of this contract, which was mutual in its character, was prevented by the appellant.

to perform his part of the centract in good seath, me that as had, at the time, the ability to perform it; that he had the 3700 in money ready for final payment; and the notes and mort-gage for the balance of the purchase price, in accordance with the terms of the contract. Applicant admitted his insbility to carry cut the previsions of his contract, requiring him to turn over the possession of the premises on March 1814, by proposing to procure for applies another dwelling place. There is a good condition at the time of the making of the contract; that the liveling house was quarantined, owing to the presence of small-

eady is children the warranty wish, but presently admitting _ ha could not their out his appreciate in the could be giving possesses and the popular his our birthrony, blat es vroposed to obtain for appelluta, some of se outside house coccept, which he could put him in possession of ent oneshing of lacified the femiliary in calcification; and the first self-and lacing and calculations of the calculations and the calculations are calculated as the calculations and the calculations are calculated as the calculat rosept; and there were the ne dr decre mod on't bewelled las เปล้าดู พระ รณีซ์ พากของ หากร้า and the contract of the contra The second secon tanga too, advances one pro onlinguage becauting en number of general top all fine ; at under the Coots presented in evidence, appelled and re raphs e e e e e dad that the evilones audio of show, that supeliaced to . rod prefermance on his part, or a villingouse and moiling to ຊູ້ນຳກາ _ເສື່ວວານເກົ່າສອດ ໄດ້ເກົາ ໃນ ລອດຄວາກການກ່ຽນຄຸດ ຂົນເສື່ອເປັນ ສັດເມີນ **ແລ ເພ**າ titual in its character, we reswented by desprished. to think this evaluance ocentus yellows, time uprelled offerna a wrm bis gart of the centract in good farth, and thed ix sit bkn in two ' if t mastring of thilids out to mit sis/ 3700 in boney ready for Tinuf guyacht; and notes and mortnativ semmentary at contra ascrenes on the semestry est not extra the confirmet. A joil, yearlited and including the . == the previous of his compount, requiring has to turn o possible of the wantage on hard last 1014, by properties Secretary of the first of the second second second with to your at the easy scattering out that , would be not got to be you

end for a framewood out to godfan end in the fait for the month of the fait of

pox; that water pipes had been frezen, and were bursted, and had dampened some of the plastered walls of the house, and had caused some of the plastering to fall; and that because of the bursting of the water pipes, there was several feet of the traction or basement of the house, which made it very unsanitary. Under the plastered, he appelles had the right to restrict the contract, and recover back the consideration which had been affected.

"It is a familiar principle that at law the time fixed for the performance of a contract is deemed the essence of the contract; and generally, if the seiler is not ready and able to porform his part of the agreement, on the day, the punchaser may elect to consider the contract at an end. " Morgan v Herrick Admr. 21 Ill. 481; Tyler v Young, 2nd. Soam. 444. The same principle was upheld by our Supreme Court in the case of Guerdon v Corbett, 37 Ill. 274; Wilson v Bauman, SO Ill. 493, and Bonnettv Glattfeldt, 130 Ill. 175. And this sourt held, in the case of Bernhardt v Trimble, 45 Ill. App. 59, that where a party fails or refuses to comply with the terms of a contract, the other party may reacind and refuse performance on his part. The facts and circumstances in evidence, clearly indicate that angellant was not in position, for a long time after March 1st. 1914, to carry out the terms of his contract; that at the time required by his contract, he was not able to turn over to ampelled, the possession of the premises; and that the premises were not in good habitable xendition or sanitary condition, nor in the condition of repair required by the contract; and that appelles, who was able and willing to perform, and offered to perform his ourt of the contract, had a right, therefore, to resaind it; and to derand a return of the amount of the consideration which appellant had received from him; and that upon appellant's refusal to return the consideration, had the legal right to sue for

nater pipes had been french, not gare horsted, and had a constant of the house, and had summed of the house, and had summed of the house, and had summed to the planetering to first the tracks of the ourstance was a vecal fact of a series of the of the house, which makes it wery unsunitary. Thus,

performance of a sombrowt is desmed the cession of the concalled the soller is not ready and able to gorcalled the agreement, on the day, the purchaser may
called to somether the sombract at an end." Morgan v Herrick

was uphald by our Sungame Court in the case of Guardon v

1, 87 Ill. 278; Wilson v Bauman, 50 Ill. 455, and Honneth;

11dt, 12C Ill. 175. And this court cold, in the case of

1. Idd v Trimble, 45 Ill. App. 56, that where a gart while

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1. In position, for a loan of a discrete that approximate out the terms of the contract, the contract out the terms of his contract;

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Tra judgment should therefore be affirmed.

Affirmed.

ATTEMPT OF THE STREET SERVICES

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I. CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this

thousand nine hundred and___

___in the year of our Lord one



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures

following, to-wit:

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Gen. No. 6138

Anna Koepke, Admrx. &c. appellee.

Appeal from Rock Island.

Misnaus, J.

This was an estion or the case commenced in the circuit court of Real Island County, by the appelles, Ann Koepks, Aiministrately of the sacute of her husband Harman Koepks, decided, while the C. R. I. & P. Ry. Company, constant, for appellant. It is alleged in the declaration, that the deceased was killed while engaged as Car Inspector's helper, in the line of his duty, by the negligents of appellant's servants; and the liability of appellant is based upon the provisions of the Federal Act relating to the liability of common carriers engaged in interstate business, to their employes.

vants, so negligently managed a switch engine and the switching which was done by specificants servants in connection with the distribution of a string of cars, around some of which the decreased was employed; also that accellant's servants, who were managing the switching and the switch engine, at the time in question, did not exercise reasonable care to ascertain whether the decreased was endangered by their work, nor give him any wanning of the danger incurred; and t. It served to the decrease in question, and that thereby they got into motion, unexpectedly, and ran into the deceased.

There was a trial by jury, which resulted in a verdict finding the appellant guilty, and assessing the damages in the sum of \$7200; and the damages were apportioned equally between Anna Koepke

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in the office of the close contained in the office to country, by the applies, Ann Acoptes, in the destate of the humband of the C. M. I. & P. By. Company, length for the country of the body of separations a servante; the body of separations a servante; that the country of the body of separations a servante; the country of the body of separations a servante; the country of the body of separations as servante;

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at thereby they got into antion, uncareacterly. It are that the

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the widow, and Helen Koepke, the only child of the deceased. And the jury made a special finding to the effect that the total amount of damages suffered was \$3000. and that they deducted \$200 therefrom for contributory negligence of which they could the messaged bill.

Judgment was rendered on the verdict, and upon appeal, it is at the principally on the ground that the cause of the death of the intestate was a part of the risk and danger assumed by him, by his contract of employment; that the damages are excessive; and that the jury who found that the appellance intestate was guilt y of contributory negligence, did not deduct a sufficiently large proportion from the whole amount of damages found, on account of such contributory negligence.

The proof shows, that the deceased, in the early morning hours of the day of the accident which resulted in his death, was angaged in work pertaining to his amployment, as helper or assistant to the car inspector in a section to railroad yards; the yards nian situated opposite to, and north of the passenger othere at Rock Island. At the time mentioned, there was a string of three mail sars and four passenger couches, standing on the side track delignated in number 3, wallh was the fourth track north of the station. These cars and coaches, in the regular course of accel--defendants ant's passenger service, were to be inspected and distributed among various trains to which they were to be attached. The deceased was assisting in inspecting and getting one of this string To care mentioned, a mail car, ready to be switched and attached to apportantly presenger train No. 39, which was bound for Kansas (1) y, Missouri; he had just helped to couple this mail car to the road engine, which was r eady to switch the car to train No. 39 and the engine had moved it about 4 or 6 feet from the ower carr. that had been left standing on the track. After themnil one as: been coupled to the road engine, the deceased began the late! testing the wheels or other metal parts of the rider in the

the widow, and Helen Moepke, the only obils of the decembed. And
the just made a special diming to the offect this total unount
amages suffered and \$2000. and that they described \$200 chorefore

principally on the ground that the cause of the heath of
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astate was a part of the risk and langer assumed by him, by

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and naves want to great voluments are not your year. ones of the day of the accident which resulted it his ignal, . . . - triped in work pertaining to his amployment, as helper or waiteas to the ear inspector in assessment a rathread yerds; the yerds situated opposits to, and north of the passenger station Trok Telera. At the time minitioned, there was a string of threa mail sare and your passenger coaches, standing on the side track saignated as number 3, which was the double truck north of the station. These part in ecoches, in the regular source of anyth-Lattle presenger service, were to be interested in listationter smong various trains to which they sees no les at cohed. Ins de-- mints that to see maints . her guitesquar at gaite, to se o series cars asotioned, a mail car, ready to a switched intathogas t = illand L passenger train No. 38, thick was beend for illnown ent of the like wife brought to the state with the contract of the - 1 engine, thich ras ; endy to satisfaction to or him he. The . The make and most be 1 3 to 1 thooks to boyon had salgat a. Last the Employ will remark the problem that need had food

term rupled to the road engine, the deceased branch that the of

click of the hammer which he was using for that purpose, had been heard just immediately before he was killed. At this time, another switching crew was operating at the other, or easterly end of the string of cars, and coaches mentioned, nearly two blocks away, for the purpose of detaching two coaches therefrom.

of "outting off" the coaches inquestion, at the east end, the switch engine, which was doing the work, must have bumped against or pushed the standing sars, it a unusual status violence or items, and the it was in consequence of such unusual force, that the whole body of the remaining cars and only moved towards the car at which the approach of these cars, and was caught between the buffers of the approaching cars, and the car around which he was at work.

It is clear that the setting of the string of cars in motion was the result of the action of the switching crew, at the east end, and was an unusual occurrence, and "herefore unexpected; it is rise. Iso, that a proper and usual prosecution of the switching operation, of "cutting off" these coaches, would not have resulted in setting the remainder of this string of coaches and cars in motion. If the setting of the cars in metion was an extraordinary or unusual incident in the ork of switching, it is clear, that the deceased did not assume the risk and danker tion of; it is only the or analysisming the rights of denoted his employment, which he had agained. And if the accident was caused by the act of the engineer of the switch engine, in striking the body of the cars in question, with extraordinary and unnecessary force and violence, and such force and violence caused the string of cars to be set in motion, and the deceased was thereby killed, such act would amount to negligence, and the

of "outting off" the solohes inquestion, at the east end, the switch engine, which was loing the must wink wind with a pushed in standard of pushed the standing care, with anisothers.or

the whole body of the remaining care authority roved towards the our at which the equaliceld intestate was vorking, who apparently did not notice the ingrecash of these cars, and the car around which he was suffere of the deprecaching cars, and the car around which he was at noth.

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striking the body of the care in question, with entractionary

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deceased did not assume the risks and dangers of such negligence.

Devine v C. R. I. & P. Ry. Co. 185 Ill. App. 488; affirmed in

366 Ill. 248; Mattocks v C. & A. Ry. Co. 187 Ill. App. 539; Mondou

v N. Y. N. H. Ry. Co. 323 U. S. 1; C. & F. I. Ry. Co. v White, 309

Ill.134. Nor Joes the law impose a duty upon one to anticipate the negligence of others. It is a presumption of law, that every person will properly perform the duty, which is enjoined upon him

by law or imposed by contract. McFarland v Jackson 189 Ill. App. 453.

It is hardly necessary for the purpose of this decision to discuss at length, the question, whether or not the deceased was ruilty of contributory negligence, by being on the railroad track, and between the mail car and the remaining string of cars, at the time he was killed. But a proper determination of that question, would involve taking into consideration at least two elements, namely, whether the deceased, at the place where he was killed, was performing the duties of his employment; and, whether he could, by the exercise of due care, have anticipated or noticed the approach of the cars moving towards him. There is no direct svidence to throw any positive light upon these inquiries; it may proterly be emphasized, however, that there is also no evidence from which the inference could be justly drawn, that the deceased was not, at the time he was killed, acting in the line of his employment; and from the nature of his employment, the marc fact of his being on the track, and between the cars, would not, of itself, be negligence. Whether, as a matter of fact, the appellant was guilty of the negligence charged, and whether or not the deceased was guilty of contributory negligence, were questions for the jury to determine from the evidence. (Tulo v O'Gara Coal Co. 185 Ill. App. 433; Devine v C. R. I. & P. Ry. Co. supra.)

The matter of contributory negligence, under the initial Liability Act, does not ber the right of recovery, but simply

deceased did not assume the risks and dangers of such negligence.

See III. 348; Mattocks v C. & A. Ry. Cc. 127 III. A.g. 528; Mondou

III.134. Nor Jees the law impose a duty upon one to anticipate the

negligence of ethers. It is a presumption of law, that every poreom will properly perfore the duty, which is enjoined upon him
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111ty Act, Sole not bar the right of recovery, but simply

affects the amount of damages which may be recovered; and under this act, damages are to be diminished by the jury, in proportion to the amount of negligence attributable to the employe. If the deceased was really guilty of contributory negligence, it must have been regarded by the jury as slight; but the extent of such contributory negligence, and the proportionate diminishing of damages, in consequence thereof, were questions for the jury to determine; and we cannot say, that the jury improperly determined either the question of contributory negligence of the deceased, or the amount to be allowed therefor in diminution of damages.

We denot regard the amount of the damages allowed as excedsive, under the facts and circumstances presented by the evidence; nor were the damages improperly adjusted between the parties to whom they accrued.

There is no substantial error, either in the verdict of the jury, or the judgment of the Court. The judgment is therefore affirmed.

Affirmed.

280 the emount of diviges which the correction and, damages are to be distributed by the jury, in protection seased was really guiley of constrainty negligence, it meets we seen reacrise by the jury is alight; but ".s extent of auch to seen reacrised by the jury is alight; but ".s extent of auch to seen reacrised by the standard of auch seen in some the seasons and the standard function of annual sees, in some the seasons and sees allowed as another, he amount to be allowed to seasons the seasons of the seasons.

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There is no substanted the Jourt. The judgment is therefore

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of in the year of our Lord one
thousand nine hundred and
viouswild into industrict fill.
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois: Present -- The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 1 4 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 6150.

The People ex rel John Britt,

SOT SILES

Appeal from Stephenson.
School Directors etc. appealant.

The Profile 24 Dibell, PpJ. John Britt, as relator filed in the circuit court of Stephenson County a petition equinst the someof directors of District No. eighty nine in Stephenson to require said directors to accrove the election made by him of the Freeport high school in district no. one hundred and forty wine five in the same town for his son. John J. Britt, and to pay the tuition incurred and to be inou red for the attendance of said child at said high school Toring the current school year. The patition alleged . at Britt was a resident and tax payer of said district Nc. signity nine and was the father of said child and that said child was within the school age and lived with him and that he was responsible for the core, nurture and education of said child; and said petition set up the statute of 1913, entitled "An act to provide or high spheol privileges for graduates the provide of high spheol privileges for graduates of the eighth grade, The patition alleged that district No. one hundred and forty five lies south of and contiguous tosaid district No. eighty nine and had a high school therein and afforde the assest and most convenient high school accessible to pupils of district No. eighty nins which offers a full four years program of study, and is, the only high school in said county with such program accessible to pupils of district xitak eighty nine; that relator selected said high school for the attendance of his child and obtained the consent of the school board of said high school for the admission of

William and Jenet Blind and

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Appeal from Ctsykenson.

Someon - Livid Well - Livid - Leading

Dibell, P.J.

strout court of Stephenson-County & petition against the Appropriate the said of the sa c w v, to require only directors to approve the selection made by him of the Fresport high school in listrict no. one hundred and forty wine five in the same town for his con, John J. Pritt, and to pay the tuition incurred and to be incurred for the attendance of all child of soid high school luring the current school year. In The patition alleged tot Britt was a resident and tax payer of said district No. signify any ilido bias tend bas blide bias to redtal edd asy bas ente within the school age and lived with him and that he was responsible for the core, nurture and education of said child; and said position sat up the mistate of 1813, entitled with the state of the contract of the state of the sighth grade. The patition alleged that district No. one hundred and forty live they south of and contiguous topaid district No. sighty mine and her a high school therein and eldicareon loodes dyid theinevnot teem in teeran of "Alrofia to pupils of district No. eighly nine thich offers and lour years program of study, and the the only high school in said sounty with such program assessible to purify of Mintoods: daid hive hetoeles noted a took tonin ythate toint or the retendance of his child and obtained the concent

the school board of said high school for "he chaistien of

said child; tout said child is a graduate of the sighth grade in said district eighty nine; that the tuition per capita of said high school a forty dollars per year, payable semi-annually in advance, and dees not exceed the per capita cost of maintaining said high school; that there are ample funds in the hands of the treasurer of district No. eighty and were sufficient funds in his hands on July 1, 1911 to pay such tuition, specifying the amounts, and in addition therato said district No. sighty nine levied a tax of live hundred dollars for the general expenses of said district for the current year, and that after paying said expenses there will remain a sum in the hands of the treasurer; that though often requested the directors of district No. sighty nine refused to grant the transfer of said child, refused to approve the selection of said high school, and refused to pay 'he tuition charged relator for the attendance of said child at said high school and did this without making any objections to the selection and without designating any other high school . The directors answered, admitting many factsand denying some of the facts alleged, and stating what sums they had contracted to pay during the said school year, and that on July 29, 1914, they levied a tax of five hundred dollars for school purioses for the ensuing year, and that they approprinted said five hundred dollars for certain specified purposes, namely, for salary of teachers four hundred dollars, for fuel fifty dollars, for painting school house forty dollars for incidental expenses ten dollars, and that said shild is in attendance at said high school. The relator demurred to certain portions of said answer and the demugrar was sustained / Proofs were heard upon the other issues, and the mandamus was awarded as prayed,

anid child; that said child by a graduate of the eighth made WHILE HE REAL THE PIECE HERE THE TANKS THE RE at this this school of large believe on year, which to semi-numuraly in advance, and seed not success the eer capita elame and eren' ten' (loodes agin bine gainteinion to teco funds in the hands of the treasurer of disprist No. eighty nine, and per-specificient cands in ale bands on July 1, 1814 inercto said district No. eighty nine levied a tex of Tive hundred dollars for the general expenses to said district for file current year, and that after paying acid cupenses there will remain a cur in the house of the treasurer; that though often requested the dir otors of district No. eighty mins radused to grant the transfer of raid child, refuled to approve the selection of said high school, and address to pay the tition sharged relator for the attendance of each child emiliar de la partir duration del como ducado de como de la como de como de como de la c to the selection and sithout designating any other high school . [Digate breaked] then galificate, Landonce applicable has some of the facts alleged, and stating what sums they had contracted to pay juring the said school year, and that on July 29, 1814, they tayied a tax of live hundred delices Comment year thair bar , usey mainear all work esso, way docaled not eriated said five hundred doring for sertain appointed ourposes, namely, for salary of trackers four hundred dollars, for fuel fifty deliars, for palaits; school house erty and her for incidental expanses ten colling, and that said ontil idin attendance at eall high school. The relator terurred to · benining of the terminal of it. resear hims to unclined mistage True same heart up of the leading the the manuscript Policy In Division In Continue

No reason was given in the answer nor appeared in swidence why the directors should not approve the selection of the high school, nor this the answer deny those parts of the patition which showed that it was reasonable that said high school should be approved. The order directing the cohool of ticers to approve the selection of said high school was therefore proper.

The statute in question says that the tuition of such pupils shall be paid by the district in which they reside "from any funds not otherwise appropriated." We are of opinion that it was not intended by these words to confer upon the directors of a school district the same power which the legislature and cities have to appropriate specific funds for certain purposes, but that the reference is to the oro vision of the general school law/which authorizes such directors to levy a tax annually of not exceeding a certain per cent for educational and a certain per cent for building purposes. Therefore respondents in our judgment were not authorized to defeat the right of the relator to have the tuition of his son at said high school paid out of the funds of the district by dividing ups the amount levied for educational purposes, so as to he appropriate to other purposes all the sum levied for educational purposes. Moreover, the school directors could not know in advance what the salaries of the teachers would be for the ensuing year. The proof was that the tuition charged by said high school of forty vollara pem mear la lat excessa i o per pantita o meditataining said / high school The proof indicated that payment in advance was required by said high school, and that at the time of the hearing of this case said child was in said high school by sufferance and liable to be expelled at any

The streets has come to meet he

svikenos thy the sirestors should not argreys the debotion of the high school, nor list the shows timy those parts of the the nestition which though that it was recessable that each other school should be seend. The order direction the sale of the school should be seend.

dous lo moisius sui tent myon moiteaup mi pupils shall be paid by the district in which hay so clique -ap io sun ew ".betsimperens seigneddo tom chund yar i ar series of deep that the first fall to be in the model moist maked once et a tainter: Tooyor 1.10 stone 111 ett woon the legislature and cities have to ammorrists are differenced Cor certain purposes, but that the reference is to the are -rib acus essivotion with wal songel arens of to noisiv setors to levy a tax annually of not exceeding a cortain partified rol than requisitional and the cant for building purposes. Therefore respondents in our judgment were not with the defeat the right of the relator to heve in tuition of his sen at axid high school paid out of the funds of the district by dividing ups the amount levish for singularity ourposes, so as to ke an roprinte to other purceses and the formes and travered tracer nor famoitacube not beivel mus to settpine is't find conven at committen bluod erotocrit the teachers would be for the ansuing year. The proof was 'hat the tuition charge by that high school o losty collars per year did not energe ! I open repile ocet of winsining said thigh school The preeft in itemted that capusmy in whom so required by this high solved, this risk or it. time of the bearing of this case this in which the this high school by sufferance and limble to be amy tief at any

time for non payment of said tuition. The judgment only required payment for the current year. An act filed in the office of the secretary of state on Judy 8, 1915, neither signed nor vetoed by the governor, reports said act of 1915, and substitutes provisions somewhat different therefor, but that act does not affect the judgment of the court below in this case.

We find no error in the judgment and it is therefore affirmed.

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STATE OF ILLINOIS	
STATE OF ILLINOIS, and second district. (ss. I, Christopher C. Duffy, Clerk of the Appell	ate
Court, in and for said Second District of the State of Illinois, and keeper of the Record	
and Seal thereof, no hereby certify that the foregoing is a true copy of the opinion of	the
said Appellate Court in the above entitled cause, of record in my office.	
IN TESTIMONY WHEREOF, I hereunto set my hand and affix	he
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thousand nine hundred and	ис
Clerk of the Appellate Court	

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

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the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6175.

Joseph W. Maple, Admr., etc.,

Appellee,

Appellee,

Appeal from Feoria.

Stephen G. Lawhun,

Appellant.

DIBELL, P.J. cocceding Aunger section eighty-one of The Main'stribion by Joseph W. Manle, sa sariniatraiter of the estate of larguret H. Henrarly, decembed, in the itophen G. Levium, realist in an order a instrumental. oorim-downly, mak, or i asl to be circuit court of a trial there is novo, in decises of Caine dim, tourout a spon out as ten ire wo turn over no the administrator a certain fund of \$4000, derived from the sal of perioin magers, herein called the benturt moduration, to certain interest charges thereon, and a certain note, executed by David Slaven, for 1,395, we a north of recurring wall privin interest our es in connection wheat with. munt o or In was charged respondent for interest need not be used tod, as the greation minod bu to first to manvisions at the state of the content is correct if the order is correct : to the 1000 and, in the Slemen note. 1 n in by the common trong the mort ego were by agreement placed in the hands of a taild party to avait the final result of this suit, and thus the amount

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Wenelin Mommerly and his wife, Margaret, owned a business building on Adams street in the city of Reoria, and lived in the upper story thereof, and owned other property. He dieden Harch 1, 1912, aged seventy-nine years, and she died on June 50, 1915. aged about seventy-seven years. Macher the title to the real and personal property was in him or in her is impotorial. site convelet in Corone is derth to To wooted the will c to all his property in his wife so that she became the owner thereof. They lived in the second story of said Adams street property for some twenty-five years. Their heirs at law were four married daughters and the children of two other daughters twollows is the husband of one of said living then decessed. daughters, and at the times herein question he lived with his family at 611 Frye Avenue. Mrs. Honnerly owned a lot next to appellants known as 609 Frye Avenue. The Hennerlys decided to cease I ving over the store, and a dwelling house was built for them at 609 Frye Avenue. The construction thereof was beaun in July, and finished in October, 1909, and the Hemmerlys occupied it. As the Hemmerlys became old and feeble, their unmorried daughter, Martha, who then made her home with her peronts, and it to has the Lichenon, collecte the ward under a power of attorney. Under the persuasion of that nower of attorney was revoked and from that it wom pellant collected the rents and attended to all the business affairs of Ir. and Irs. Homnerly. His contention concerning the \$4000 is that it was proposed for a long time, culminating po maps in the spring of 1908, that he should build a house

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(this vacant lot, similar to his own house, and should bay for it, and that when they died he should have the house and lot. lie claims have from July to Corober, 1905, as all hard the house at a cost of \$4000, and paid for it himself, and that afterwards and after the store property had been sold, he asked Mrs. Hommerky to pay back to him what he had expended for the house, and that she authorized him to take \$4000 of her Denhart securities in payment for the cost of the house, and that he did so possess himself of said securities, and afterwards realized the cash upon them, and that he thus became the lawful owner of said \$4000 in satisfaction of a like sum which he had paid for After the Hemmerlys had moved to Frye Avenue negotiated for them, in part through an agent, a sale of the Adams street property for 325000 to David Slaman. The sale was consummated on October 50, 1911. The consideration was paid as The purchaser assumed a \$5500 mortgage upon said follows: premises: he turned over to the Hemmerlys mortgage securities to the principal sum of \$14,000, which he had obtained from the Denhart bank at Washington, Illinois; he gave a note to Mrs. Hemmerly for \$6,395, and secured the same by a second mortgage on the premises: and he transferred to them three certificates of deposit issued by the Commercial German National Bank of Peoria, aggregating \$552. These sums amount to \$24,227. The belonce appears to have been paid by some accrued interest on the Denhart securities, less accrued interest owing on the \$3,500 mortgage assumed, and perhaps some commissions paid some one for conducting the sale, and possibly some cash. A tin box was obtained and these securities were placed therein, and I'rs. Hemmerly delivered the box to respondent to be placed in the

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· 6 in reason lot, cimil with its ore lours, and chools got ins with thick three the case in a case in a case the lace and the lace. de live det lo defeber, 1908, he did built tris Loans 66 o none of 6600, no good for the birt off, the cook <mark>Belba ni , Mas spel Dai nimegern spila sife water fire planethie</mark> rall work became out was this wife of those you of the enterior. house, and 2 ob the embrochard him to take 14000 of her Bork. m. Tile el dent form , especialistición on el formation desemplo, sub exaltitures tas cari apon timos, can atrib be time I seems the Largini omner of hoste - 1990 in contains them of . Time con which he had publich in Jakobyi, uyril di Buya (ballir jibr rail rin goʻfti 🐪 📢 🕏 nagoviskač fiz čhon, in g ro through en gest, o gala ski lkt Adems cired gregoriy don jabood to David Siberum. Dis rolls was sommuna fed on Ostobou DO, 1911. The countiernation v. maid A A line was a subtract to the s prominent: No trimmed order to the Marmanlyss restigare securities. to the geineaged and of the 000, which he are substantial of the seminary burns at the time to an entire the contract to the contract to nstabiliting espect and of bornologner ed by . ; kenings and no

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safety vault of the Merchants National Bank for safe keeping for her. She had a key to said box. He placed the box in the vault of the There - no proof that she over afterwards had access to that She was not with him when he placed it there. He had no information that she ever went to that box after he placed it in the bank. The trial in the probate court was some eighteen months before the trial in the circuit court, and during all that time he must have known it was important for him to ascertain if any officer or employee of the bank had ever seen Irs. Hennerly go to that box. He produced no proof on that subject. She gave the key to him at his request whenever there was any business of hers to be transacted in connection with the content, or the bor, rach collecting invocation the se-Armilyni almine that non-the sent of her hills, we. Hommerly brought him the Slaman note for \$6.595, and the mortgage, and gave them to him as compensation for all he had ever done for her and that he thereby became the lawful owner of said note and mortgage. He had proviously testified in a way that implied that all the securities for wich the Adams street property was sold were placed in the tin box and taken by him to the benk and deposited in its safety vault, and that he did not remember taking anything out for her except interest coupons. Boing and confronted with the inquiry where she got the \$6,395 Slaman note and mortgage to give to him, his only explanation was that probably the did not put those securities in the tin box. It further appeared that will system of the elign of the elign of the second second second he intended to do so, nor had they ever before offered to pay I mything. He did not s'ow services of any such value. he had had frequent settlements with lirs. Hermorly before that time, at which times she would naturally have poid him if she had oved him for In the latter part of her life and when she was ill, her aughters, other than Ars. Lawhun, came to their other and tried to

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Adams street property, but and learn had acquired such an influenceover her that she resented their inquiries, and some estrangement resulted. After her death the administrator opened the box and found that about \$11,000 of the proceeds of the ale of the Adams street property had disappeared, and as Lawhun was the only one who had had access to the box or had transacted her business, the administrator filed this petition against Lawhun in order to ascertain where that part of the estate had some to.

ture argued that an objection of cramil record proof of title, and that as he had possession of this \$4000 fund and of this Slaman note and nortgage before Irs. Hemmerly died, his title thereto is, thereby established, and that the case so made has not been overcome. He state of the enral rule correctly, but in our pinion that is not the law where the respondent was the confidential agent of the owner of the property, with language statists for abundant of summary to the entre it to his own possession without the knowledge of the owner, but that in such case the agent who turns up with the property in his possession after the death of the owner through whom he had confidential access to the property, with the ability to get it secretly into his own possession, is required to assume the burden of establishing that he came by such property in good faith. Adams v Adams, 81 Ill. App. 657, and 181 Ill. 210. The fiduciary rolation existing between appellant and Ir, and Irs, Hemmerly, and between appollant and Mrs. Horner; y after her husband died, is abundantly shown in this evidence, as well as his access at will to these securities; and his supposed possession does not, in our opinion, establish a title in him thereto.

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Appellant, had for many years worked for an electric limit company at Reoria at \$70 per month, or \$840 per year. He had a family to support. He received some rentals from certain real estate in Peoris, but he owed large sums secured thereon and lud interest charges to pay, as well as repairs, insurance and tumes. By a will of his mother, which had mover been admitted to probate. he claimed to own a farm in Mentucky, which he had now seen for twenty-five years, but from which he received \$100 rent per year. By the same will be claimed to have received five shares of stock in a certain loan association in Indianapolis and that he realized something therefrom. At first he testified that he had received some \$2000 therefrom over twenty years before. Afterwards his Memory failed, and he was unable to testify anything about how much he had received therefrom. He claimed that by an arrangement with his employer he only worked about five hours per d y and was allowed to take electrical jobs for himself on the outside, and that he did so and had done hundreds of such jobs, and thought he might have made \$1000 per year thereby. Then pressed to name those hundreds of jobs he was able to name but a very few of them, and he had no books of account by which he could show any of them. The superintendent of his employer tostimic hat specificat's hours of labor at the plant were from seven a.m. to five thirty p.m. except two-thirds of Saturday of, and that he knew of no arrangement by which to take outside work on his own account. Amellen's named the foreman with whom he had this arrange ent, and the superintendent testified that that foreman had not worked for that company for fourteen years. It is evident that appollant did not acquire

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The in the month of the state o composit to Provide at 170 composition a color to the constant Sanily to any only. He usestrak northeku dron cortain wash ್ಯಾಗ್ ಸ್ಟ್ರ್ ಪಂಗಳಂತ್ರ್ ಕೊಂಡಾಂಡ ಕಾರ್ಯ ಕೈಡಿತ್ ತಿಲಾಗು ಈ ಹಾಗೆ ಕೃತಿಕೇ ಸ internery charges to gay, as well in repairs, issue and trues. Ty a rill of the reduce, this had mayor been editived we probust one most No. Sen of deline typowing the contract a new of beckel, of www.dy-five reams, but for milel it researce ilos for read By the ware till he whence for home because it is shown as about in a sometim lost osseciovion in Indianagelis and hat is besliced conething threateen. At fire's artition the hold in insentrad none 18000 navecition orna mandy pr THE COURSE WELLS OF SECURE A SECURE OF SECURE SECUR To desir Demieto ell .morrentet devices. Etal es deur wer describe i sera the ent the discovered to only revised chent thre bears w for two allowed to tests slockwised joins for immself on the outerise, and first he wid so and had done hundreds of sank john, and the second construction of the second constr a firm maker of office part of office to about their over the rate W Mary of them, and we had no booker it ascense by Thisah he could Delighers andorone our go propressionens our " " " the go has The state of the second of the case were then the company to five whimen p.m. encour two-whires of Sector to the policy. Interpretate to the management of a new particle of the property of the proper s film emballs work on his am accorni. Am alters my ad wit force with whim he had nother owners ont, i.w. the emportational out.



from these sources \$4000 with which to built said house. He had a brother, Samuel H. Lawhun, whom he had not seen for some twenty-He testified that this brother came to his home five years. on a visit in March. 1908, and stayed a week; that he told his brother that the Henmorlys had proposed that he build a house for them on their adjacent lot as good as his house, and they would give him the how e and lot at their death; that the house would cost 84000, and he needed money with which to build it; that on March 10, 1908, during said visit, his brother took from his pocket \$5800 in bills of the denomination of five, ten and twenty dollars, and loaned it to him, and that he gave his brother a promis ory note therefor, payable in fice years with interest at five per cent per annum, payable annually. He did not deposit said money in any bank, although he was accustomed to carry a deposit in a bank. He testified that he had in his collar a sheet iron receptable for the safekeeping of money and papers, fastened with a padlock, and that he placed said (3800 in that receptacle. The contract for the house was not made till one year and three months thereafter, and he was paying interest on various debts, yet he kept this coney in the in the any investment all that time. He testified that bebuilt that house mostly with this money, though he drew some small checks therefor on a small electring account which he kept in a bourt, and that said small checking account only contained about (200 at a time: and that he wid 04000 for the house. S. M. Lawhun testified that he left his Kentucky home when he was less than ten years old and had ever since shifted for himself; that he had been in every city in the United States; that no became a photographer; that he would go to a town and establish a gallery and run it two or three months or two or three years and sell out

emod will of ears well on in it food which was all the tract, or it all Blot of that the Mood, 1900, and obeyon a work; that to told the nor exposs a filter of the Control for a group of the filter of the filter on their sajacent let us pool in his lears, this real was north The him the hour of the factor death; that the red on and and and # \$ \$4000, and he needed he app which thich to build it; that on ock 10, 1900, durkur sead wiedt, bie burker wook drom his mo key 50000 im bills of the consinution of five, ten out wanty will . , and looned it to him, and that he gave his twother a the state of the s of fire yor cent per came, gyelle cameally. We fill mot schooling a nome, in each beauty although is we accusioned to commy a s voile and all missing the Postition of the Line and tion White them receptable for the safeliceping of homey and hapers, and with a galloal, that he placed said [6800 in thet preside. The configuration for house that not have difficence one. or and three months thoroughter, and he was parting interest on THE PARTY OF THE P endá indu Ele verendusvel o monety with this money, though he down some which thecem medion on a maill chooding account watch is from in a bene, to bime; gur Mark is grad (1900 for the Loude. . It. Bowland actions that he help his Harbucky kence when the was lead than In I of trait Theorem I wok bothing opply you have fan blo so w where it is being for the following the will be given out that he would no vowe a vorm and earlier a miller;

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then go to another town and start another; that in that business he cometimes make \$100 per day, sometimes \$100 per week, sometimes \$100 per month and sometimes he worked for his food. He vertified that he had a trunk in which was a private receptacle for payors and money; that in April, 1908, he came to Meoria to visit brother Stephen, whom he had not seen since early boyhood, and brought in said trunk about \$4800 in currency; that though he had with him a wife and child and stayed a week he left this trunk in the baggage room of the passenger station at Peoria; that when he found his brother needed money with which to build this house. he went to the baggage room, opened the trunk, took out \$3800 carried it to the house, loaned it to his brother, and took his brother's note for five years without security therefor. on the capter tetille fire to ever sein ippollant testified that he sent his brother once \$190 or one year's interest, and another time \$580 or two years! interest, and once he waid himsome interest when his brother waid him a subsequent visit at Reoria, and that this was all interest he gaid, and that he did not remit this \$190 and \$580 by check or draft or express, but that in each case he did up a package containing the amount named in five, ten and twenty do lar bills and sent them to his brother by registered letter, and received in each case a registry receipt which showed the amount of the remittance, though the officer who issued the receipt did not see the money. He was unable to produce any such receipts. and he did not call any one connected with the Bost Office to show that any such registered mail was ever sent. S. H. Lewhun testified that 3580 was once sent to him by bil by amplacent as interest, but that he never had to sign any receipt when he received it, and that the rest of the interest was remitted in sums of five, ten and twenty dollars at a time by mail, and that he had received

illes go to ancite of the call the call and the first and the first fraction ho one times and o \$100 per day, come that a \$100 new week, comethin m 1900 gra trombh and zohotimushi havvatios kes his diso. He venbilled to briefly ha will be turn a grivered receptually for the prover Want in Trail, 1900, he came to Reorie to risis the broking towhen, then in had of teem pinus combr toyhook. ... infield algored and processing at 600 M and classes literate literate mi akura ding that ed deov s boyes bas blind has shir s mis Adri the sugrams moon of the tendescards which on the Hearing that at on , to or ains blind of Maker dy hy gone beloom wedfor bill boson od ment to this lengther more, opened that varuat, took out 1886 corrich it we the hours, leaded it to his trother, our took is Destination mote flor dince you are in hord aboutify the content. For viena da jamenta da la composición de la composición del composición de la composición del composición de la composición de la composición de la composición de la composición some tradition of the second total felthings gradified , 1900 on one me 0350 with recipers that the rate of the mean received interest, and once in paid himsome interest when his fruther paid him : auborguenu vieit ut Poorie, and thet the test the fit interest is paid, and that is did not remit this fill on the file T choose or draft or arrage. But thet in appl case ha dik up a puckage confeining the amount maked in Alve, ten call a make for Lor Bills and nows when to bid tradica by registerest lighten, of the new transport the Little and the terror track the new training of the not noe file conog. He was weekle to protect emp such coelpte. will be fill done only in the best can come of the tent of the fill and ince there are a well a contatangle with race over cast. I. I. I. I writing a rule Med the book the and come to the of the op and cold the cold second, but that he mover ind to migh any seconds whim he sectors it, and the time that make of the interport med monitored in areas or thirt. ben and brandy delicans at a sine by audi, an eret or 1.0 meestre?

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over flitty are itt mees of intarper at 12 from ... sum in an elect s iron box grow the longer he was questioned about it. At first he stated that there was some other oney in the iron box, and that when this \$3800 was put in that made about 34500 in the iron box. Before he was through testifying he had stated that when the \$5800 was placed in the box it made the total therein about 37800. He did not explain the change in his to timony from \$5800 to \$4500, nor from \$4500 to \$7800, nor did he show any source from which hecould have obtained this extra 34000. None of this money in the box was ever reported to the assessor. It is the hard history of the true. Hen have history large rune of money and the terist of holing forgue relievely. winned The name vivo, he down, decrew actively improved a Ohviously it was not believed by the probate judge nor by the circuit judge. They saw these witnesses and observed their domeanor on the witness stand, We have not equal opportunity with them to judge of its truth, and we do not feel called upon that to credit what they disbelieved.

On August 10, 1909, shortly after the erection of the house was begun, appearant procured for ar. and Mrs. Hem erly a loan of \$1000 at a bank in Peoria, and received a check for \$987.17, the discount value of said note; and they turned that check over to another, and he deposited it in his own account in the Merchents Mational Bank. Four days later, on August 14, he paid Duff a Brown, the contractors who built said house, a check on said account for \$200 and on September 3rd another check for \$200, and on September 21 another check for \$200, making \$600 that were clear to

over filter monitifunction in the manufaction will from ു നെ വെ തുറ്റുനാള് വാർ നാന്ത്ര മാവ് വാന്ത്ര ക്ഷ്യ് ആരു വ .i tymie gine omen and wash that there are other this object the from bon, and thet wich this joses was put in the train and acut 4500 in the tren ber. in doods free History and another the charge in it as el-# from \$6800 to 54500, now thom 64500 to 57800, now Six bu that Arrest substances in the substances of the substance of the substances of the substance of this money in the best the error for this to the thirty. L. L. Land Black this british and the contract of the contract and the later of the state of t THE PERSON NAMED IN COLUMN TWO IS NOT THE OWNER. Min Standard Top Spectro St. John St. of the State - ar me him for -- the city of man - ineati put tim time

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paid out of money the "emmerlys borrowed just after the house was Appellant could not find his other checks on said account nor the stubs from which they were drawn, but it is fair to assume That I can I to \$1000 obtained by the Hermerlys and deposited 🛂 banis account was upol as mai. We have already mentioned that when the Adams street property me gold there were esting on it for ,, 600. Loun, as obtained by the Har arlys on Dakeller Sa, 1909, as home the time of the completion of the cours. The an from the got it understood it was to be used to pay for this house, though he did not pay special attention to that as his security was on other real estate. For that loan Hemmerly received a check to his order for S,495.50. He endorsed it in blud and differen on the control of the in his own account in the Merchants National Bank, and on the same day drew a check on that account for \$1,005 to pay the loss of 1000 the Hermerlys had made in August, and also drew a check to Appellant to stified that Duff & Brown Duff & Brown for \$1000. had done nothing for which supel and should pay them except to build this house. There this 1000 is nit by appollant of the Province in the second of the contraction of 1,000 of in the of the control of the or of the in not not not not not not show what he did with the rest of their noneys, deposited in his account, and it is a reasonable conclusion that that 33500 to may for building was house, and molica of the second that he deposited the \$5,49 . JO in his own account in the bank

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because Frs. Hommorly was everse to having a check, and that he paid for her that sum in each out of the money in his iron bor in his cellar, and he left the impression that he paid her that sum in money at once. Afterwards he stated that he did not pay it at once nor in large sums, but that whenever she wanted to pay a bill or wanted a little money for her own use he paid her in small sums from time to time, and had frequent settlements with her, and in this way gradually paid her the \$5,495.50. In this state of the proof we are satisfied that the Hemmerlys borrowed the \$5500 and placed it in the hands of appellant to pay for the building of the house, and that appellant expended that money for that purpose.

It is worthy of note that in scarcely any matter vital to tale once in massliant corrobor tod by our such to diment a case that of his brother, and that Most of the checks and stubs of check s and receipts which light throw light upon this case he to negliningly said in a Linot produced. customed to keep such papers. He Washot shown that he made thorough search in all places where such papers might be. his earlier examination he indicated that he might find then by His last explanation was that his wife told him further search. that at a certain house cleaning event she destroyed some of his Although his transactions with the Hennerlys checks and papers. of histomorphotems with the account the most His claim that Tre. produced ho book Hemmerly gave him \$4000 of Denhart securities to repay him that he had spent of his own funds in building the house rests solely on his own testimony. He mist have known that it would be velue blo sin to alvo so we have to be with

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were in a box to which he alone had actual access. That he knowthe value of evidence is shown by the fact that on July 12,1912,
he induced its. Hommerly to go with his wife to a lawyer and there
have a paper drawn in English, a language which

of the evidence shows she could not read, in which she certified
to her confidence in appellant's honesty, and that he had transacted the business of her husband and of herself fairly and had no
money or papers in his hands belonging to her! There is nothing
except appellant's testimony, to show that she know then or at
any time during her life, that he had taken \$4000 worth of the
Denhart securities, or that he then had the Slaman note. We
approve the decision of the court below as to the \$4000.

That the Slamen note for \$6,395, kept in said tin box in the bank, was giver to him by Mrs. How only to pay him for his services rests upon and interported testimony, and unfor all the circumstances his elim aught not to stand in view of the fiduciary relation in which he stood to her and the fact of his access to the tin box in the bank, and of his evidence that the proceeds of the sale of the Adams street property were placed in that box, and of the fact that apparently no one but himself could have taken it out of that box.

There are numerous other matters in evidence which tend to create doubt of the validity of appellant's elaims, but it would unduly extend this opinion to discuss the evidence further. There are many notes, checks and other documents in the rule 16 (137 Ill.App. 625) requires the found of the result of the rule found. There will be found. Each party filed an abstract. Newton of them

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of the business of her importal and terreis failed for the manery or respons the his head, belonging to her? There are no along money or respons the his head, belonging to her? There are no along the fail that the head the his star (4000 rest) of the Donlars countities, or the terreism that the flesh the flesh mote. The first countities, or the terreism that the flesh are the flesh and the first country as to the first country of the terreism to the first country of the terreism to the first country as to the first country of the terreism to the first country of the terreism to the first country of the terreism to the first country as the the first country to the terreism to the first country of the terreism to the first country to the terreism to the first country to the terreism to the first country to the first country to the terreism to the first country to the first country

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indexed the exhibits. We have been put to much unnecessary labor by this emission to observe the rule.

No question has been raised here as to the authority of the probate court to take this action under section 81 of the Administration Act, and we therefore do not discuss that subject.

The order is affirmed.

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STATE OF ILLINOIS.
STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6180.

Mary Virginia Marcy, Exerx. &c

appellant.

VS

Appeal from Peoria.

Milton S. Marcy, appellee.

Dibell, P. J.

R. Summar Marcy died in New Jersey on March 5, 1894, owning real and personal estate in New Jersey and leaving a last will which was duly admitted to probate. By his will he gave his widow. Mary S. Marcy, his personal property and the use of his real estate so long as she remained his widow, but authorized his executors in their discretion to sell his real estate during her lifetime and invest the proceeds and pay the income therefrom to his widow, and directed that at her remarriage or death the executors should sell said real estate. The will mave legacoes of \$100 each to his son, Milton S. Marcy, to his daughter, Hetty O. Miller, and to his grandson Summer M. Miller and his grand daughter Anna Miller, said legacies to the grandchildren to be paid to them at the age of eighteen years, which they have long since reached. The residue of his estate was given to his son, Walter F. Marcy, and his daughter Lucy E. Marcy, both of whom were blind from birth; and said residuary clause contained certain provisions if either or both of them should die without lawful issue. The will nominated Mary S. Marcy and Milton S. Marcy as executors, but they declined to qualify and an administrator with the will amexed administered the estate. The widew never re-married and she died on January 27, 1907. During her lifetime the administrator and each of the beneficiaries joined in a deed, conveying certain real estate left by the deceased for 3,659.47. By consent of all the beneficiaries

Gen. No. 6180.

Mary Virginia Marcy, Exert. ic

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Append from Pacriza.

Milton S. Marsy, appelled.

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R. Summer Marcy died in New Jordey on March 5, 1884, coming real and personal estate in New Jersey and lanving a last which was auly admitted to probate. By his will be wave his ridon. Mary S. Mercy, his personal property and the use of his real satate so long as whe remained his sidow, but. Inat sid lies of notistostic thad in anothers and issinodius estate during her lifetime and invest the proceeds and gay has income therefrom to his widow, and directed '.nt at her remarriage or leath the executors should sell boid real estate. The will gave legaques of \$100 each to his son, Milton S. Marcy, to his Saughter, Heity O. Willer, and to his grandeon Surner M. Miller and his grand daughter Anna Willer, said loracies to the grandohildren to be paid to them at the arc of sighteen years, which they have long since reached. The residue of his estate was given to his con. Walter P. Yerra end his daughter Lucy F. Mercy, both of whom were blind from birth; and said restinuty clouds contained cortain cro-inform if either or both of them should die without lawful issue. The will nominated Mary S. Mercy and Milton S. Marcy as executors, but hey lectined to qualify and an administrator with the will a norted administered the sature. The willow never re-marrial and she died on January 27, 1807. Durin, sales in the control of the control

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under the will, \$639.47 of the consideration for which said real entate was sold was paid to the widow to be used by her as she saw fit, and the remaining \$3000.00 was placed in the hands of Milton S. Marcy for investment, and he was to pay over the income and distributive that principal in accordance with the will of the testator. Under this arrangement the four legacies of \$100 each were not paid, and the interest on said \$3000.00 was divided equally from time to time between Walter and Lucy. Afterwards Walter conveyed to Lucy whatever interest he had in another piece of real estate left by the testator, and in payment therefor Lucy directed Milton to transfer \$800 of her share of said fund to Walter's part of said fund, and thereafter Milton paid the interest on \$3300 to Walter and on \$700 to Lucy. On February 15, 1912 Walter died without issue and left a will which was duly probated, whereby he gave all his property to his widow. Mary Virginia Marcy, and made her executrix of his will. She claimed that at his death Walter owned \$2300 of said fund in the hands of Milton, and demanded it of Milton, and Milton refused to pay it. Thereupon as executiix and in her own right she filed a bill in equity against Milton S? Marcy in the circuit court of Paoria County, where Milton residedm for an accounting of the investment of said \$2300and for the payment to her of the principal thereof and interest thereon since the death of Walter. In said bill, she claimed that the expression "die without lawful issue" in the residuary clause of the will of R. Summer Marcy meant die without issue before the expiration of the life estate granted to the widow, and that when Marcy S. Marcy died while Walter was still living, he then became the absolute owner of said \$1500 and of said \$300 and she therefore was satisfied to the same under the will of

under the will, [888.17 of the corpheration for which suit real yet last at the mid to the court of the court by her to be the court of the co as she saw fit, and the re wining 10000.60 was placed in the hands of Milton S. Parcy now invastment, and he was to pay Ingioning of studictsib music muincatutate has enough and ravo -a marke stat webnU. wotatest ent to film ent dithe sommarcos at went the four legarise of \$100 each wore not gaid, and the interest on said (3000.00 was livided equally from time to tits bitreen Malter and Lucy. Afterwards Walter conversi to Lary states from the read in another piece of real estate. left by the testator, and in payment therefor Lucy directed Milton to turnsfer 1800 of her share of said fund to Welter's yard of said lund, and theresiter Mitten and the interest on (Recoite Multer of Sien (700 to Lucy. On February 15, 1813 Walter Hed without isous era left a will which was July mebased, whereby he gave all his property to his widow, Mary Virginia Parcy, and rede har executrix of his will. She elained that at his death Walter owned \$3500 of entd fund in the Passing my LIV Day , wallet it it is not con , morito in the same to gay it. Thereupon as exscuttix and in her own right she Itled a till in equity against Militen 37 Marcy in the circuit court of Filtin Oconty, where Milton resided; for an accounting cal the investment of said 18600cmd for the payment to her drawi edr sonte nosredt teerest for losmedt fericalro ed' lo of Walter. In told will, the siningd that the expression "ife without lowful issue" in the ".sidusty planet of the will of R. Summer Marcy meant die without lieus before the expiration of the life cetate granted to the widew, and that when Morey S. Marcy that white Telter was shill living, he pre. Star to the QCSI, bit to remo stulpack sit amound asi. To fifty of the salar same end of belitted any englement

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Walter. Milton answered, claiming that under a true construction of said residuary clause, it meant "die at any time without lawful issue;" that when Walter died without issue, the whole income passed to Lucy during her lifetime; and that when she should die, if without issue, then by virtue of certain other language in said residuary clause, making provision for the death of both Walter and Lucy without lawful issue, the fund would first go to pay said four legacies of \$100 each and the rest to Milton S. Marcy and Hetty O. Miller, or to the survivor of them if only one was then living. Under an order of reference the master took the proofs and reported that Milton should pay from said funds: the costs and the four legacies of \$100 each, and should divide the residue into two equal parts, and should pay complainant onehalf thereof and \$800 from the other half, and should pay the balance to Lucy. The court sustained some and overruled other execptions to said report, and hold that all the funds vested in Lucy upon the death of Walter as well as the income accruing after the death of Walter and dismissed the bill for want of equity. Complainant below appeals.

Complainant claims that she is entitled to the entire \$2500 to the exclusion of the four letacies of \$100 each. Defendant claims that she is entitled to hold the entire fund till the death of Lucy and pay her the income and if she dies without lawful issue the fund belongs to himself and his sister, Mrs.Miller, if they both survice Lucy, and the court decreed that the entire fund belonged to Lucy. The only persons parties to this litigation are the complainant and Milton S. Marcy. On this appeal the court is asked to determine that Lucy has no interest in the \$2500 and that the four letacies of \$100 each were abandoned by the legates

Complainent claims that the is entitled to the entity \$2000 to the exclusion of the four lemoiss of [100 each. Defendent claims sent the four lemois of the entity of antity of antity of the interest of the feath of the feath of the first the interest in thout lewful issue the fund islongs to his alf ond his eister, Mrs.Miller, it they both turvies busy, and the court decreed that the entire fund belonged to Lucy. The court decreed that the entire fund belonged to Lucy. The court decreed that the entire fund belonged to Lucy. The court decrees the first only dereons parties to this litigation are the court in the start of the court in the start of the court in the start of the repeat to the court in the section of the

when they consented to deliver \$639.47 of the proceeds of the real estate to the widow of R. Sumner Marcy. These legates and Lucy were not parties to this suit. In equity svery person having equitable or legal rights in the subject matter of the suit should be made a party. It is not necessary that the lack of proper parties should be set up by wither wide, for whenever the court finds a lack of proper parties, it "will, ex officio, take notice of such omission, " and will roluse to proceed in the suit till the plendings have been amended and the omitted parties brought into court. Frenties v Kimball, 19 Ill. 319; Granquist v Western Tube Co. 340 Ill. 132; Conway v Sexton, 243 Ill. 59; Nolan v Barnes, 368 Ill. 515; and authorities there cited, to which might be added many other cases , and 30 CYC 141. We are of opinion that Lucy E. Marcy, Hetty O. Miller, Summer M. Miller and Anna Miller, if they are still living, and the persons who legally represent the interests of any of them who may be deceased, must be made parties to this litigation before the court has lawful power to decide the questions raised by the pleadings and evidence and arguments here presented.

The decree is therefore reversed and the cause is remanded to the circuit court of Peoria County, with leave to appellant to make parties to the suit the persons kurnimizers herein above indicated, and to make such amendments to the pleadings as may be proper. If appellant should elect not to take such course within a reasonable time, then the court is circuit to dismiss the bill. Appellant and appellee will each pay one-half of the costs of this court.

Reversed and remanded with directions.

Niehaus, J. tock no part.

ball, 19 Ill. 519; Granquist v Vostorn Twos Cc. 840

1. 183; Ccaway v Sexton, 848 Ill. 58; Wolan v Dernee, Cl

1. 515; and authorities there offed, to which might be many other cases, and 50 CVC 141. We were of opinion Lucy E. Marcy, Hetty C. Miller, Sumner M. Willer and

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[,] J. took no part.

STATE OF ILLINOIS, ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this day of
thousand nine hundred and
Clerk of the Appellate Court.



61 4

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 1 4 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6184.

James T. Burns, Admr. etc.

appelles.

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Appeal from Kankakee.

Nellie Clark, appellant.

Dibell, P. J.

On September 7, 1915, James T. Burns, Administrator of the estate of Carrie Langdon, deceased, brought an action of assumpsit against Nellie Clark in the Kankakee Circuit Court and filed a declaration consisting of the common counts, with an affidavit attached thereto that defendant was indebted to plaintiff in the sum of \$3,779.90. Defendant filed a plea of non-assumpsit, accommanied by an affidavit that she had duly stated the case to her attorney and was advised by him that she had a good defense on the merits to the whole of the plaintiff's demands, and that she believed that to be true. There was a jury trial and a verdict for plaintiff for \$3179.90, and judgment for plaintiff therefor and defendant appeals. Mrs. Nellis Clark, Mrs. Carrie Langdon and Levi Benjamin were aisters and brother. Dr. F. R. Langdon, husband of Carrie Langdon, died at Louisville, Kentucky, early in February 1913. Benjamin and Mrs. Clark went there to the funeral. Mrs. Langdon was suffering from an incurable disease and after the funeral her brother and eister brought her to the home of Mrs. Clark in Kankahee, Illinois. Mrs. Langdon had money in a bank in Louisville, and before they left there Mrs. Clark was in possession of the amount Mrs. Langdon had in the bank in the shape of a draft or check which she brought with them to Kankakee. Shortly after they reached Kankakee, probably the next day, and on February 13, 1913, Mrs. Clark opened a checking account in a bank in Kankakee in the name of "Mrs.

James I. Eurna, Admr. etc.

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Argent from Markes.

Dicell, P. J.

On September 7, 1915, Jones P. Eurns, Administrator of the cetate of Carrie Langdon, deceased, brought an action of assumpait against Wallis Clark in the Mankakse Circuit Court and filed a declaration consisting of the common sounts, with an affidavit attached thereto that lefendant was indebted it to seig a helift tostastic .99.277.80 to mus soft it littaising non-accountait, asson unied by an officavit that the 'rad fully stated the case to her attorney and was navised by him -inte the had a good defense on the merits to the whole of the plaintiff's demends, and that she believed 'at to be true. There was a jury trial and a versiest for plaintist for \$3178.80. and judgment for plaintiff therefor and defendent argerls. Mrs. Wellis Clark, Mrs. Courte Langdon and Lovi Benjamin were sisters and brother. Dr. F. R. Lungdon, muchand of Carrie Engdon, Lied at Louisville, Kentucky, early in February 1010. Benjamin and Mrs. Clark went there to the funeral. Test's has subset' fiderwoni as mort gairslies ear mobgasa is funeral nor brother and sister prought her 'e the home of Mrs. Clark in Manhales, Illinois, The Languen has money in Ermio .and arout thei you'd roled bar , offive wol at amed a was in possession o' the imount lire. Langdon had in the 'anh in the shape of a draft or check which she brought with i.m. to Mankakee. Chortly after they reached Menhakee, problem the next day, and on February 16, 1910, Mrs. Chark count a . with account in a cank in Markeles in the mare of "twr.

P. R. Langdon or Nellie Clark" and deposited on that day to said account said draft or check in the sum of \$3,179.90 and received a deposit book in the same name. On June 5, 1913 Mrs. Clark drew out that sum of money and closed the account. On June 8, 1913, Mrs. Langdon died. Thereafter appellee became Administrator of Mrs. Langdon's estate and brought this suit to recover the amount of said deposit. Mrs. Clark, in defense proved by various witnesses declarations by Mrs. Langdon; some to the effect that she had given this draft or this money or all her money to Mrs. Clark; and others that she wanted or intended to give this money or her property to Mrs. Clark. Mrs. Clark had kept a house of ill fame and is the party was named as appellant or plaintiff in error in People v Clark 187 Ill. App. 613, and 268 Ill. 156. Appellee in cross examination of appellants witnesses and otherwise proved that the place where Mrs. Clark kept Mrs. Langdon till her death was or had been a house of ill-fame, and compelled several of her witnesses to give testimony tending to show that they were or had been inmates of thet house, and it is contend ? by appellant that it was error to permit this kind of cross examination to defame the witnesses and appellant, and that thereby the jury were greatly prejudiced against appellant, and that but for the great stress laid upon this subject by appelles's counsel they jury must have returned a verdict for appellant. The keeper of a house of ill fame is sntitled to a fair trial in a suit involving property rights, and it has been a serious question with us whether the rights of appellant were not unduly prejudiced in the minds of the jury by the course prusued by appellee's counsel; and whether a new trial ought not to be awarded for that reason. is however, a condition appearing near the close of the proofs which satisfies us that no other verdict could have been rendered.

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A few days before Mrs. Langdon diez Mrs. Latimer, a daughter of Mrs. Langdon by a former marriage, and her husband, came from their home in Springfield, Ohio, to Kankakee ucon a telegram from Mrsz Clark and remained there till after the funeral of Mrs. Langdon. They had a conversation with Mrs. Clark after the funeral concerning this money deposited in the Kankakee Bank. They testified that Mrs. Clark at first denied that there was any money in the Kankakee Bank belonging to Mrs. Langdon, and that when Latimer told her that they had been to the bank and ascertained . that Mrs. Langdon had money on deposit there, Mrs. Clark then admitted to them that their mother had about \$3,300 on deposit in the bank. In rebuttal Mrs. Clark was called as a witness in her own behalf as to said conversation, and she placed the conversation at a different hour of the day from what the Latimers did, and gave a somewhat different version of it, but stated that she in that conversation said to them: (meaning Mrs. Langdon) gave all the money she had to me to pay her bills." This was entirely in harmony with her opening the account in the bank on the name of Mrs. Langdon or herself placing Mrs. Langdon's name first. Mrs. Clark had a savings deposit in the same bankm, and if she had possession c f the draft or check from Mrs. Langdon as her own property by gift from her sister, she would naturally have deposited it in her own account. The form in which it was deposited was consistent with the idea that it was still Mrs. Langdon's money, but that Mrs. Clark could check it out in payment of Mrs. Langdon's bills. Under the state of lacts disclosed by Mrs. Clark's evidence, if it was true, she could not be permitted to retain the entire deposit as her own, but she would have been at liberty to show by competent witnesses what bills Mrs. Langdon incurred during the four months

A few days before Mrs. Langdon dick Mrs. Latimer, a daughter of Mrs. Lengdon by a Corner warrings, and her husband, came from their home in Springfield, thio, by Manighte woon a and wedness that and anther the telegram from Mret Clark lungral of Hrt. Langdon. They had a conversation with Mrs. Clark after the function concerning this money seposited in the Lunnake Bank. They tostified bast Mrs. Clark at first denimal that there was any money in the Maniahae Egnk belonging to Mys. Langdon, and that when Latiner told her that they had been to the bank and ascertained . that Mrs. Langdon had money on LITTLE HER OF EDITING AND AND AND AND THE PERSON OF THE PE mother had about \$5,500 on deposit in the bonk. In rebuttal Mrs. Clark was delled as a vitness in her own behalf as to soid senversation, and the placed the senversation at a titfarent hour of the day from what the Enthrers lid, and gave a somewhat different version of it, but statused that she in that conversation said to them: (enum "She (eseming Mrs. Langson) gave all 'he money the bod to me to pay her and pullation and the poster of province are single " principal be a server to be a laborate plecing Hrea -bungdon's mese liret. Wre. Clark had a saving: deposit in the same banks, and if she had possession of f the raft or check from Mrs. Langdon as her own property by wift from her sicter, she would naturally have deposited it in her oun account. The ferm in which it was deposited was consistent with the isas that at man etill here. Done long money, but that Mrs. Clark could o'self it out in my sent of Mrs. Langion's bills. Under the etate of sayts singlesed by Mrs. Clark's evidence, if it was true, the sould not eas ind , mo and at theoget entities and mister of best thanks would have been at liberty to chea by commetent situesess

at bills Mrs. Langdon thoursed during the four weaths

she lived in Mrs. Clark's home, and the proper amount of such bills, and that she had paid them or become liable to pay them. Appellant contends that the court refused to permit such proof. This is a minax misapprehension of the record. Her counsel did then ask her: "Did you pay all her bills?" and the court sustained an objection thereto. Under "he statute Mrs. Clark was a competent witness as to the conversation with the Latimers after the death of Mrs. Langdon, but she was not competent to testify to what she did in the lifetime of her sister. If she had answered this question by "Yes" that would have been immaterial. Apparently the idea in the minds of counsel was that if she testified she had paid all of Mrs. Langdon's bills, that would entitle her to retain the entire fund. No effort was made by appellant to prove what bills were incurred nor what sums she paid upon any bills for Mrs. Langdon. Apparently she thought proper to rest her case solely upon the claim that the fund was an absolute gift to ner. Dr. Brown, a witness for appellant attended Mrs. Langdon during the entire four months. He was not asked the amount of his proper charges for his asrvices to her, nor whether he had been paid, nor by whom. As applant conceded according to her own testimony, in her conversation with the Latimers, that this fund was placed in her hands to pay the bills of Mrs. Langdon, and as she did not chose to prove that she had paid any such bills nor how much she paid, the jury could not do otherwise than return a verdict for appellee for 'he full amount of the deposit.

The court gave an instruction for appellee that under the pleadings they had no right to deduct from the sum, if any due plaintiff any sum defendant may have earned by caring for Mrs. Langdon during her last illness or which she may have

she livel ir Mrs. Clark's home, Put line to dimposis require such billis, and blat she had gold them or besome limble to pay them. Appallant contends that the court refused to sermit auch proof. This is a waxnam misservanteion of the record, Her counsel hid then ask her: "Did you may all her pille?" and the court quetained an objection therato. Under he etatute Mrs. Clark was a sempetant dithough as to ins senvereation with the Latimers after the death of Mrs. Langdon. but she was not sompetent to testify to thet she did in the lifetime of her sister. If she had enswered this question by "Yes" that would have been immetarial. Apparently the ties in the minds of counsel was that if she testified oil had paid all of Yra, Laurdon's bills, that rould ortitle her to retain the entire fund. No officet was whis by copellant to prove what bills were incurred nor what sums she paid upon suy bills for Mrs. Langdon. Apprently-she thought cropsu -na wan part that that winte or acqu visios ease red feet of absolute gift to sen. Dr. Brown, a mitness for appellant attended Mrs. Langdon during the entire four months. He was not soked the amount of his proper charges for his strvices to her, nor whether he had been poid, nor by whom. " As appliant conceded according to Ler can testimony, in her conversation sith the Latimera, that this fund was placed in hir hands. to pay the bills of Mrs. Englon, out as she lid not choos to prove that she had paid any such bills nor how much was paid, the jury could not ic otherwise than return a vertice for eggellee for the full amount of the legesit.

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The court ave as instruction for appelled that under the pleadings the pleadings they had no right to issuet from the sum, if any sum defendant or have carred by caring or Mrs. Langdon during her last illness or which the ear interpress or which the early interp

expended for the benefit of Mrs. Langdon. We conclude that if Mrs. Clark received the fund for the purpose admitted by her and had made such expenditures, she was entitled to recoup the amount thereof. Recoupment is the act of abating a part of a claim on which one is sued, by means of a legal or equitable right resulting from a counter claim arising out of the same transaction. It rests on the principle that .it is just and equitable to settle in one action all claims growing out of the same contract or transaction. It is a reduction of the damages claimed by plaintiff by proof of circumstances connected with the transaction on which the plaintiff's claim is based which show that it would be contrary to good conscience to permit plaintiff to recover the full amount of his claim. 34 CYC 623, 634. This can be done under the general issue, which in this case was the p ea of non assumpsit. Higgins v Lee, 16 III. 495; Babcock v Trice 18 Ill. 430; Turner v Retter, 58 Ill. 364; Murray v Carlin 67 Ill. 236; Cooks v Preble, 80 Ill. 381; 34 CYC 643. For statutory reasons this lack of necessity for a special plea seems not to apply to a suit on a note. Waterman v Clark, 76 Ill. 428. But as there was no evidence from which the jury could allow Mrs. Clark any sum for services or disbursements on account of Mrs. Langdon, the giving of the instruction in that form did not harm appellant. The instruction should have said that the jury could not do this under the tvidence, instead of under the pleadings. In the view we take of the evidence of Mrs. Clark and her failure to imakened introduce any evidence showing what, of anything, she had expended Mrs. Langdon, the other questions argued by appellant are immaterial and need not be discussed, further than to say that Latimer was a competent witness to what he and Mrs. Clark said in their conversation, and he did not relate what

if Mrs. Clark received the fund for the purrose admitted by her and had made such expenditures, she take the to recoup the amount thereof. Recoupment is the mot of abating a part of a claim on which one is sued, by means of a legal or equitable right resulting from a counter claim arising out of the sens transaction. It rests or the principle that it is just and equitable to settle in one action all elaims growing out of the same contradt or transportion. It is a reduction of the damages chaimed by plaintiff by proof of sircumstances connected with the transaction on which th. -not ad bivow it tant works doing bease at mists a fittinising trary to good conscience to permit plaintiff to recover the iu. I amount of his claim, 34 CYC 623, 624. This can be done under the general isaus, which in this ones was the g sa of non assumesit. Higgins v Les, 16 Ill. 495; Babcock v Trice 18 Ill. 450; Turner v Rotter, 56 Ill. 264; Murrey v Carlin 67 111. 236; Cooke v Preble, 30 111. 381; 34 CYC 645. For statutory reasons this lack of necessity for a special plea seems not to apply to a suit on a note. Waterman v Clark, 76 Ill. 428. But as there was no evidence from which the jury could allow Mrs. Clark any sum for services or disburss. ents on account of Mrs. Langdon, the giving of the instruction in that form did not harm appellant. The instruction should have said that 'he jury could not do that and ar that of instead of under the pleadings. In the view we take of the evidence of Hrs. Clark and her failure to inniraluce any svidence showing what, of enything, she had expanded for Mrs. Langion, the other questione argued by appellant ore immaterial and need not be lisoursed, further than to ray the state of the s

expended for the benefit of Mrs. Langdon. We sensinge that

his wife said in that conversation. We find no reversible error in the record, and the judgment is therefore affirmed.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this

thousand nine hundred and_

day of ______ in the year of our Lord one

In the feature of the community of the control of the

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present -- The Hon. JOHN M. NIEHAUS, Presiding Justice

Hon. DUANE J. CARNES, Justice

Hon. DORRANCE DIBELL, Justice

CHRISTOPHER C. DUFFY, Clerk

E. M. DAVIS, Sheriff

200 I.A. 301

BE IT REMEMBERED, that afterwards, to-wit: On April 14,

A. D. 1916, the Opinion of the Court was filed in the Clerk's

office of said Court, in the words and figures following, viz:



Ag. No. 1.

Gen. No. 6025.

542

ELIZABETH POOLER,

Appellant,

.

PLINY C. SOUTHWICK,

Appelleo.

APPEAL FROM LA SALLE.

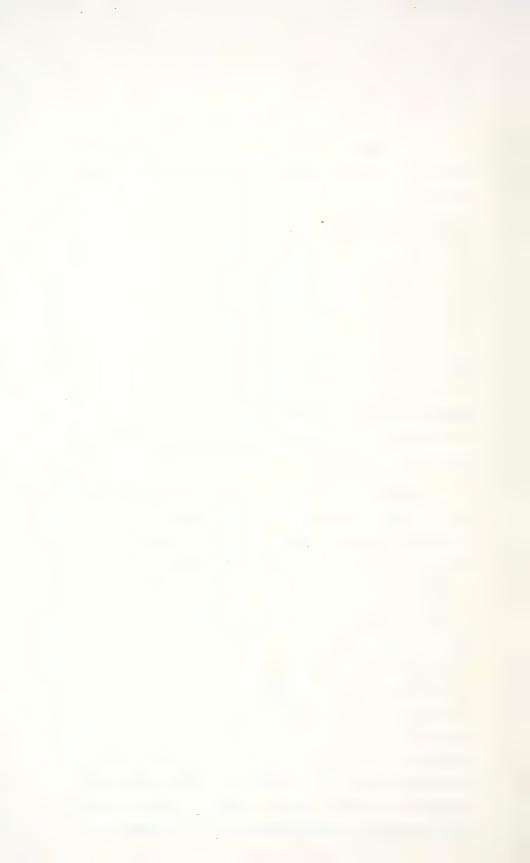
CARNES, J.

In June or July, 1904, the appellant, Elizabeth Ecolor, was riding on a public highway with her niece in . a horse drawn carriage. The horse lecame frightened by an approaching automobile driven by the appellee, Pling ?. Southwick, and appellant was thrown from the carriage and seriously injured. July 6, 1905, she began this action to recover for that injury and filed a declaration charging only common law negligence in careleasly and negligently running and peruting the automobile upon a public highway. On February 27, 1907, she filed two additional counts to the declaration declaring upon the act of 1903 to Regulate Speed of Automobiles (Hurd's Rev. State. 1903, Chap. 121, Par. 269a) It was provided in that act in section one that an automobile should not be driven along any noad or highway faster than fifteen miles per hour; in section two that when a horse driven upon the read became frightened by the approach of an automobile the driver should bring the machine to a full stop; and in section four that in an action for damages proof of the violation of either of



ditional counts has any place in the legal consideration of this case; that there is but one count of the declaration before us and that is the first, or original semmon law count, because he says the counts were filed more than two years and a half after the cause of action accrued and after a count charging common law regligence had been filed as the declaration in the case; and also that the act of 1903, under which the two additional counts were drawn and filed, was repealed expressly and by revision without a saving clause by the act of 1907, and therefore the right of recovery for violation of the former act was lost by its repeale.

Appellee raised the first question in the trial sourt by the plea of the statute of limitations and obtained there an adverse decision, which he does not here question by filing a cross error. We do not see her it can be said to be before us for decision. Our supreme and appellant courts have many times disposed of similar questions on the mere statement that no cross error was filed, often without any discussion or citation of authorities, but in Pelcage v Slaughter, 241 Ill. 215,224, the purpose of the statutory assignment of cross error and consequence of failing to observe it is fully discussed with citation of many authorities. The court said— If one party appeals the opposite party will be considered as acquiescing in all rulings of the trial court, unless his objections therete are presented in spme proper manner. And points out

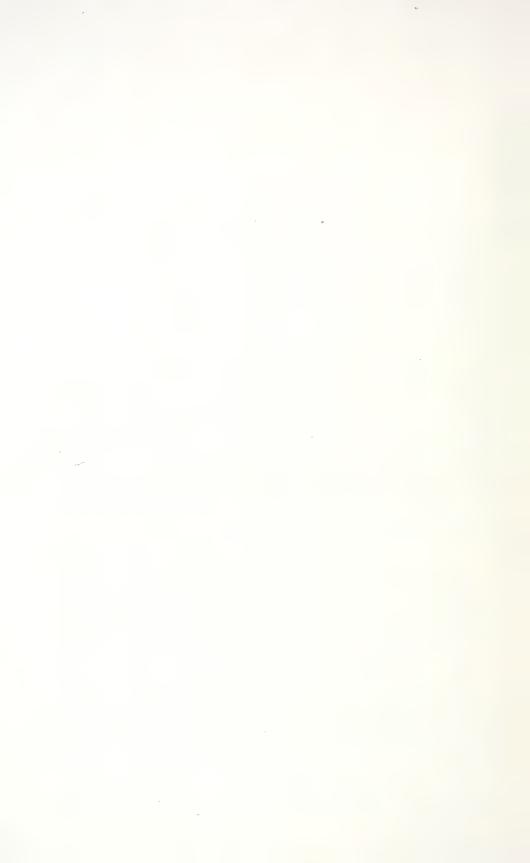


the necessity of assigning cross error in these where a party does not desire a reversal of a decree or judgment. In addition to the authorities there cited see Stowell v Speneer, 190 Ill. 453; Provert v. Herrie, 150 Ill. 40; The leeple v Shelem, 238 Ill. 203; Meyer v Meyer, 247 Ill. 536; City of Hillebore v Grassel, 249 Ill. 190; Forcum v.Brown, 251 Ill. 301; Village of Shunway v Leturne, 225 Ill. 601. But whether appellee was at the time of the judgment entitled to recover on proof or admission of the facts elleged in either or both of the two additional counts is positive material.

While the trial court held them good on demarrer and also as against a plea of the statute of limitations, still if there was no statutory law making the conduct complained of actionable they may stand as immaterial allegations of fact upon which a judgment could not be entered.

The Motor Vehicle act of 1907 was no doubt intended as a revision of the act of 1905. It repeated in section 12 section 2 of the former act, and substituted for section 3 different regulations as to speed at which a motor vehicle might be lawfully driven on a public highway. It in express terms repealed the act of 1903 with no saving clause. Later in 1911 an act on the same subject was passed (J & A. State. Par 1501, et seq) which the court held in People v Sargent.

254 Ill. 514, was intended to supercede all previous legislation on that subject. That act contained a saving clause, and it is not contended that it affects any question arising



in this case. The question is whether after the repeal of the act of 1905 a plaintiff may recover under the provisions of that act in a suit begun before the repeal for an injury sustained while the act was in full force. This question involves the consideration of many cases of this and other states on the consequence of the repeal in different ways of a statute, and on the effect of the provisions in relation to repeals and saving of rights of action accreing theretofore in chapter 131 of our statutes (J & A. Stats. Vol. 6, Par. 11105) These questions were so thoroughly discussed in Merlo v Coal & Mining Co., 258 Ill. 328 and the authorities in this and other jurisdictions so extensively refiewed that we need not extend this opinion by a repetition of what is there said. For reasons there stated we are of the opinion that the act of 1907 repealing the act of 1905 cannot be held to deprive appellant of her cause of action under either of the sections of the act of 1905 relied on in the additional counts of her declaration. As we understand the law, we are not permitted to disregard the two additional counts or to consider whether the court erred in holding them good against the plea of the statute of limitations. The injury complained of occurred and the suit to recover was brought and additional counts filed before the statute was The defendant raised the question of the existrepealed. ence of the statute and rights accraing under it by demarrer to the additional counts, and then waived the demarrer by pleading to the counts, and no question is zerol here as to the action of the court in overruling the demarter or sustaining the plea of the statute of limitations. We are of



the opinion, as before expressed, that appellant's right of action survived the repeal and have not considered whether the court erred in holding the additional counts good against the plea of the statute of limitations.

Appellant also objects to certain instructions that they left the jury to determine the materiality of facts; that they did not confine the inquiry as to negligence to at or near the time and place of the accident; that they left the proposition that the plaintiff amst recover under her declaration, or some count thereof, in doubt by the use of ambiguous language. There is some ground for these criticisms. We conclude that the judgment must be reversed because of what we regard the principal error in ignoring the two additional counts in the instructions to the jury, and will not discuss in detail other objections to the instructions.

Appellee cross examined a material witness by calling her at ention to testimony that she had given on another trial, which was claimed to be in conflict with what she was there stating, and in his argument to some extent treated her answer that "she did not remember", or something to that effect, as equivalent to an admission that she made those statements, and perhaps was permitted to go further on that line of argument than he should have done without making proof by way of impeachment that she did on the other trial make those statements. The rule is that when a witness



neither directly admits nor denies the mate or declaration, as when he marely says he does not recelled, or gives any other indirect enswer not accounting to an admission, it is competent to the adversary to prove the affirmative and we do not understand that without so proving the affirmative he should be permitted to assume that such contradictory statements had been made by the witness. He need not go further into this question as it can easily be avoided on another trial by following the rule permitting proof of such statements as above noted. (Ray whell, Ma III.

444; I.C.R.R.Co., whaten 206 III. \$25; Objects City Ry.

do. whatthisson, 212 III. 292. The judgment is reversed and the cause remanded.

Reversed and remanded.



6108

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 203

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court of

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

...

Michael Dinneen, appellee

vs Appeal from LaSaile.

City of Ottawa, appellant.

Carnes, J.

Michael Dinneen the appelles was injured December 39, 1910, by steeping into a hole in a street near the side-walk in the city of Ottawa and sued the city to recover for that injury, and had a verdict and judgment for \$725.00.

The city prosecutes this appeal and relies for reversal solely on the claim that the evidence does not show either negligence on the part of the defendant or due care on the part of the plaintiff. No error is claimed in rulings on the evidence, or giving or refusing of instructions, or as to the amount of the verdict if appellee is antitled to recover;

Appelles was at the time of the injury a man about seventy years old. He had lived in Ottawa a great many years and had been, for a number of years, a member of the city council, his last term of office expiring about eight months before the accident, a part of the time serving as chairman of the street and alley committee, and a part of the time as a member of the sidewalk committee.

At the northwest corner of Columbus and Joliet streets there was a hole, or excavation, near the angle made by the sidewalks where years before a catch basin for the sewer had been put in there and the hole left open. There was no guard protecting the hole. There would be little danger from it in 'he daytime. A pedestrian would not fall into it if he kept on the sidewalk as he turned the right angle to cross the street. The accident happened at about cleven of clock of a dark night. The street was lark at that place

Appoint from Easte Inc.

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Michael Dinneen the specified was injured Desember by stepping into a hole in a strest near the oldenst injury, and had a verifict and judgment for (750.00. The city prosecutes this appeal and relies for reversal solely on the claim that the swid noe does not show sither negligence on the part of the standart or due care on the part of the present of the plaintiff. We error in claimed in rulings on the evidence, or relasing of incornations, or as to evidence, or introduct of the verdict if ampelies is ontitled to recover; the smount of the verdict if ampelies is ontitled to recover; anty years old. We had lived in Ottawa a reat dany years and had been, for a number of years, a samber of the city council, his last term of office expiring about eight ronter council, his last term of office expiring about eight ronter

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as a member of the sidemalk committee,

Appelles was walking north on Columbus street and intending to turn at a right angle and go east and walk on Joliet street. He mistook the place, and turned just before reaching the walk, falling into the hole and thereby receiving the in jury complained of. The ground was hard and level at the place where he turned, and he thought he was still on the walk He had theretofore been accustomed to walk to his home in this direction on Columbus Sixxxx and Joliet streets, but had habitually used the other side of the street. It'is argued that from the fact of his long use of these streets he must have known of the excavation and therefore was bound to avoid it. This was a question for the jury and their conclusion that he might not have known it or might, in the exercise of due care, have forgotten it, should not be dis-'urbed by us. It is urged that because of his connection with the city council he should have known of this defect, and that he is suffering from a neglect of his own duty as a member of the council, and should not be heard to complain. The fact that his past duties were such as to give him knowledge and notice of the conditions of the street was for the jury to consider in determining whether he was in the exercise of orlinary care/ There is no foundation in law or reason for an assumption that a member of a city council must, at his peril, leave all the streets and walks of the city in safe condition when he retires from office. It is clear that the expavation was one that in the exercise of ordinary cars the city should have covered ord guarded. Ingermitting it to remain at that place for so long a time it was guilty of actionable negligence and charged with notice of the condition. Whether appelled was in the exercise of ordinary care for his own safety was a fair 'question

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to form at a right angle and or seas ilk on Joliet street. He mistook the place, no 'arned just before r aching the walk, failing into the hole and thereby receiving the in jury semplained of. The ground was hard and level at the place where he turned, that he thought he has still on the walk He had theretofore been acquetoated to talk to his hows in this direction on Columbus Sirsui and Jeliet strate, but had insbitually used the other side of the street, It is stoeric each to esu gnot aid to took add mort that baugus haund and enotated in moitaveous and lo award even them an to avoid it. This was a question for the jury and their sencluston that he might not have known it or might, in he emercias of lue care, have forgotten it, should not be itsturbed by us. It is urged that because of his connection with the city council he should have known of this defect, and that he is suffering from a neglect of his own tuty as a nember of the council, and should not be heard to complain. The raot that his may deties were such as to five him kno ledge and notice of the coulitions of the atrect was for the jury to consider in determining whether he was in the exercise of ordinary care/ There as no foundation in ish or reason for an assumption that a sember of a sity souncil must, at his parti, leave all the streets and large of the city in safe condition when he rotires from exites. It is Lear that the evoavation we one that is the exercise of the same of the same of the same Artist and the same Artist and the same of th Ingermitting it to remain it that place for so long a ting it was guilty of solicenble negligence and district this as ionart of the sentiage with the the the the standing noithrag that a sew years aw. wish to be etac in cilical for the jury, and we are of the opinion that their conclusion was not so unreasonable as to permit either the trial court or this court to disturb their finding. The judgment is affirmed.

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not so unreasonable as to pirmit sither, the trial sourt

Alchredia

STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
VILOUSBING BIRD BUILTING WIN
Clerk of the Appellate Court.
Cierk of the Appendie Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice. 200 1.1

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

TH Dan May 24.1416

BE IT REMEMBERED, that afterwards, to-wit: on

APR 1 4 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6149

Richard J. Elemaster, appelles

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Appeal from Stephenson.

Thomas Rogkey, appellant.

Carnes, J.

In November 1910, the appellee, Richard J. Blamaster Relacidan purchase. . ron the accelent, Fhomes Rockey, a residence property in the city of Freeport, and in consideration therefor conveyed him an equity in an eighty acre tract of land in I Routet Michigan, and paid him \$3300.00. Appelles obtained a loan of the \$3300.00 by mort aging the Freeport property. February 21, 1911, he executed a warranty deed of that property to defendant -poollant for an expressed consideration of \$4300.00. This deed was never recorded, and appelled testified that it was executed as a security for a \$500.00 obligation incurred for him by the aggerlant. In May 1915, specifies executed another warranty deed of the premises, which was delivered to the thefendant appellant. The consideration expressed in the deed was \$4500. and it recited that the grantee assumed and promised to pay mortgage encumbrances of \$3300.00 and \$100.00 respectively Appollesis claim is that this last conveyance was made in pursuance of an oral aggrement that he would convey the premdefoundant ises to appellant and pay him \$400.00 in money, and that delendant should assume and pay the mortgage indebtedness and convey to appolled the equity in the eighty acre tract of land in Michigan and cancel a called two notes of \$100. delic Laut and \$200 respectively, which appellant had discounted at a bank; that he executed and delivered the deed and afterwards Luchant tendered appellant \$400. but appellant refused to accept the money and refused to convey the Michigan property, and failed or refused to cancel or cause to be cancelled the two notes4 viersuon appelles croucht this suit is usumisit to

Richard J. Blamaster, appelled

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CONTROL OF CASE INCIDENCE purchasel from the applicant, Thomas Roskey, a reclines incconveyed him an equity in an eighty head tract of lead in Michigan, and paid him (5800.00. Aspelled obtdined as lown of tha (3300.00 by mort aging the iredport projerty. Tetraeny 21, 1911, he executed a marmanty food of that property to Las for in expressed consideration of \$4300,00. This ised was never recorded, and a collectified that it was executed as a security for a \$800.00 obligation incurred for him by the apjellant. In May 1813, speelles executed another warranty isti of the premines, which was relivered to the epolent. The consideration expressed in the dreame. AECT. of basimour har beauties espart and that hatitet is han pay mortgage encumbrances of \$6300.00 and \$100.00 researchively Appollects sighm is that this light senveyance are ares in The second second second second second second second chould assume and pay the mortrage inimplement and sonvey to exposite on its equity in he sighty were tract of land in Michigan and cameel of the dead of the mouse of TIL.

and (200 respectively, which exections has dead : 1 of marine bank; that he areouter and leaker sed and leak : 1 of marine in and refused to convey the Hahiyan process, and the convey the Hahiyan process and the convey the Hahiyan process and the convey the State of the convey the convey

recover the market value of his sixify in the Freeport paperty at the time of the conveyance in May 1913, and had verdict a diplorent or 1300-00. The election of the conveyance in May 1913.

and office at appointed was involved in abte and liminial if isulties and he was endeavoring to aid him and for that purpose took the deed of the Freeport property and assumed the mortgie indebtedness thereon that the creditor might have the benefit of his responsibility; that nothing was said about the Michigan land or about a saide to maying him \$400 at that time; that he had at other times offered to convey the Michigan property for \$400 and at one line had a deed executed to be delivered on payment of that sum, but the money was never offered him; that he held the deed of the Fresport property as a mortgage and there was never any agreement. intent, or purpose that it should operate as a conveyance jevi ending a borgain and sale. He last not lore a see statement that the prior deed of February 21 1911, was intended as a mortgage, but insists that it operated as an estoppel claim that the later deed was to convey the title. We see no good ground for this contention.

The jury were compelled to choose which of the radically conflicting statements of the transaction was entitled to weller. Tack party sectified to his varion of the matter, and was to one intent operation of the matter, and was to one intent operation. There was an attempt to impeach appellant as a witness by proof that his reputation for truth and veracity was bad, a displace that is reputation by him to prove a good reputation. The impeaching two area taken to other, warranted the jury in looking with some a sepicion upon appellant as a witness in his own behalf. They evidently believed appellee's statement. The trial court was

at the thine of he conversion in May 1825, and cantilet one the selection

- c la sicim 49- ne b roposità kominyolves in accta ol. The of gains weeks see and lan weithweit in Labourail has and for that purpose took the acce of the Fragers process indicate a second control of the second of the control of the cont grintun da. r (ysufficierrejer mulifilu tilmese ellt evnif tigim said about the Militar lead or about segeries and id (400 at that, time; which end of the part time officered ind with and grape for the for the car at the line inc. a deed excouted to be felivered on payment of "hat sun, but the cover offered him; the bollow the deed of the ininginga in reven can eredi ban ej njanom 2 au yikenjerj intenty or purpose that it should operase as a contry noe eviloncing a borgain and sole. He asset not cony alreaders to s'atsment that the prior deed of Frbruary 21 1011, and interisi La a montgage, but ineighs that it operated is an enterpel and the contract that the contract deed was to convey the analisette attention of any as see at unity

-- The jury were domested to croses this of the rational; conflicting etatements of the error of the ration to belief. The branch of the error of the creater of the case of the creater of the confliction of the case of the creater of the creater

of the opinion that they were within their proper province in so finding the facts, and entered judgment on the verdict We cannot say, from a reading of the record, that error was committed by either warry the jury or court in passing upon the facts.

The court at the instance of the plaintiff, gave the jury the following instruction: - "You are instructed that if you believe from a preponderance of all the evidence, that the plaintiff and defendant entered into an oral agreement whereby the plaintiff was to convey to the defendant all his interest in the house and lot in question in this suit, and in addition thereto was to pay the delendant the sum of four hundred dollars and in consideration thereof them defendant afreed to convey to the plaintilf a certain eighty acre tract of land in Michigan, and if you further believe, from a preponderance of all the evidence that the plaintiff did convey the house and lot in question to the defendant and in addition thereto offered to the defendant the sum of four hundred dollars legal tender of the United States of America, and it you further believe, from a preponderance of all the evidence, that the defendant refused to convey to the plaintiff the said eighty acre tract of land in Michigan and refused to accept the said sum of four hundred dollars, then you will find the issues for the plaintiff and assess the plaintiff's damages against the defendant at such sum, if any as you may believe, from a preponderance of the evidence, the fair cash market value of plaintiff's interest in said house and lot in the city of Freeport, at the time of sych conveyance thereof, exceeded the incumbrance thereon."

We think this instruction correctly states is in, and it was the only instruction given in the case except as to the

the opinion that they were lithin their proper oraning in so finding the facts, suf entered judgment on the verdict committed by sither addition the jury or court in reseing user the facts.

the start on an element of the contract of the start and the following instruction: - "You are instructed int if you believe from a preponderance of all the evidence, that the plaintiff and defendant entered into an oral agreement are neby the plaintiff was to convey to the defendant all his interest in the house and lot in question in this suit, and in admittion thereto was to pay the defendant the sum of four humbred delier. and in consideration thereof them defendent afreed to sense to has plaintiff a certain signify ages trace of lend 1. Michigan, and if you further believe, from a proponderance of all the evidence that the plaintiff dis convey the hours staneit moitilia in bur tandanteh edt of moitesup at tol bar offered to the defendant the sun of four hundred sellars Is as tender of "he United States of America, and if you wurhor believe, from a preponderance of all the evidence, that the defended t refused to convey to the plaintiff the raid simily airs of theode of fearing has negligit at bard to deed eres sum of four hundred do lard, "hen you will find that theuge for the plaintiff and acess the plaintiff's decayes were not the defendant at such pun, if may as you may inlier, from a preponderence of the rvilings, the fear ones a riet wellsof plaintiffs interest in east house "nd let in the ofth ; F Infinite (leares someyevade deta lo emit edit to tropeer ", thing in any and mushi add

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form of verdict.

Appellant's contention is based on his version of the transaction. Assuming that to be true, he insists that the case should have been transferred to the chancery side of the court for an investigation there as to the amount of the indebtedness and the right of appellee to redeem. He endeavored during the trial to have the case so transferred. His error lies in the assumption that his statement of facts must be taken as true. A vendes sued at law for the purchass price of real estate cannot transfer the action to the equity side of the court by pleading and attempting to prove that the deed was given as a mortgage unless he succeeds in establishing the truth of his statements.

A query may occur whether the measure of damages was the market value of the squity conveyed by appelles, or the value of what appellant agreed to give and do in consideration of the conveyance, including the market value of the Michigan land. This question is not much argued, and appellant says it is not in the case. He plead the statute of frauda we suppose with the view of meeting the allegation that he had agreed to convey the Michigan land to appelles. We suppose that agreement was within the statute and thereforew unenforceable. Appellant treated it as such. At least he refused to convey the land, which, under the authority of Booker v Wolf, 195 Ill. 365, terminated the expressed contract and permitted a suit to recover on an implied agreement.

Evidence was introduced as to the market value of the Freeport property at the time in question. The opinions, as is usual in such cases, varied; but taken the together the evidence sustains the verdict based on that testimony as to taken.

There is a great amount of special pleading in the record

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Appellant's contention is based on his version of the transaction, Assuming that to be true, he insiste 'hat 'he oses should have seen truesferred to 'he okuncery eise ofthe court for an investigation there es to the smount of the indicatored distributes and the right of angelles to redeem. He endoavoued during the trial to have the oses so turns sured. His error lies in the assumption that his statement of facts must be taken as true. A vendes sued at law for the purchase grice real estate gannot transfer the action to the equity rist of the court by pleading and atlementing to errors that the

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is usual in auch cases, varied; but 's ben when the strange is to

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and arguments based thereon that we have some difficulty in following. The common counts and the general issue are <mark>junt of Norphyndings. To introduce on seculi entiferare</mark> in behalf of defendant that could have been admitted under any special plea was permitted to go to the jury. There may have been error in refusing defendant leave to file pleas and in sustaining demurrers to pleas, but as appellant was not deprived in the introduction of evidence, or in the instruction to the jury of any legal right to which he was entitled under the facts, we are not inclined to discuss the action of the court in ruling upon special pleas. He was not injured and should not be heard to complain. (Hartford Fire Ins. Co. v Olcott, 97 Ill. 439; Harrison v Thackaberry, 348 Ill. 512, 516; Tokheim Manufacturing Co. v Stoyles, 142 Ill. App. 198). Finding no reversible error in the record the judgment is affirmed.

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and arguments based thereon lint of news derifablity in following. The common county we will expected the following. The common county we will exist now the time time in the placed of the placed of the could have been and and the could have been about the refusion in the court of the court

[3]. Finishing to reversible the the proof the judgment is theirmed.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

BE IT REMEMBERED, that afterwards, to-wit: on

APR I 4 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6178.

Evalyn Kingman, appellee

vs Acceal from Peoria.

Louis Kingman, appellant.

Carnes, J.

This is an appeal from an order committing the appellant Louis Kingman, to jail for contempt of court in default of payment of installments of temporary alimony theretofore ordered in a suit for separate maintenance begun April 9, 1913, by his wife, Evalyn Kingman, the appellee, and from the refusal of the court to set aside or modify said prior order and reduce the amount of payments to be required in the future.

The parties were married in June 1906. Ampachee filed - bill in chancery for separate maintenance in September 1908. The records in that suit and two collateral matters were before this court and opinions filed in October 1909, reported in 150 Ill. App. 456, 468, 466. After the final determination of those suits counsel say she filed another bill for spparate maintenance which was dismissed by her. Then followed the bill in this case and a cetition for temporary alimony. The court after a hearing on the petition, on November 13, 1914, ordered appellant to pay for the support and maintenance of appellage during the pend noy of the suit \$20.00 per week until the further order of the court. After wards May 27, 1915, appelled filed a petition alleging that said weekly payments had been made up to April 34, 1815 and that none had been made thereafter, and taked for a rule on appellant to show cause why he should not be affached for contempt of court. The rule was entered and accellant on June 14, 1915, filed his answer stating in much detail

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This is an appeal from an order sommitting the appellant to a linguam, to jail for contempt of sourt in default of at all installments of chipotenty dimeny thresholded to it in a suit for say and teamnes beque total figures. It is also make the means to a this should be set and by and prior refund of the sourt to set and by and prior crist out to use the exount of payments to be required in forms.

The parties nor married in June 1003. A-con-I in allamorry for expanate reinforcamen in September Wars offers this sourt and evinione filed in October 1987, portof in 180 Ill. 150, 488, 188, 400, After the fire 1 wantone holil to's you lyonger after yeard lo moits, iame and he bearingly and helds commentation attended not II Then followed the bill in this osculand a naturion but tarporary alimony. The court notice of its rings or the prediction, on November 16, 1814, ordered sagesties to pur ton its in genr and mediate and of the first principal of the open and man fine wards May 27, 1815, Companies that the title of their This and firm to the state on a first contract the track that the sirv s voi leda ito, estimatedo elom meso bod enon de. Letter in the face lends of the leases work of the field the sentence or one of their to reside all

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h:s pecuniary condition and inability to make the required payments. Brisfly stated, it appears from the answer and the evidence that at the time the order for temporary alimony was entered appellant was in receipt of a salary of \$1000.00 per year from the Kingman Plow Company, and a salary of \$1000.00 per year as a trustee under the last will and testament of his father, Martin Kingman, deceased; and that it was upon the basis of that income that the order to pay \$20.00 per week was entered; that he then had no other source of income and no property except his interest in the estate of his father; that the estats had become much involved in debt and financial difficulties; that the trustees of the estate and members of the Kingman family had been compelled to nscotiate with creditors and arrange the affairs somewhat to their distation; that appallant was obliged to relinquish his two salaries and join with the other members of his family in incurring personal obligations for the payment of the debts, and that the whole family were in a struggle to preserve the Kingman estate from destruction; that he had no means of complying with the order, and therefore had not rade the required payments. He asked that the rule against him be discahrged and prayed that the answer be taken as a petition and that the court should vacate and set aside or modify the order theretofore entered, or at least reduce the amount of such payments to be made in the future. The court, on a hearing of evidence, which is preserved in the record, entered an order July 12, 1915 (computing the weekly payments to the time of the order) finding appellant (230.00 in arrears and ordering that he pay that amount, which appellant failing to do he was hold quilty of contempt of court and ordered committed to the county fail for the tarm of thirty days "and until he be discharged by due process of law" or released on compliance with the order from which

. a psountary condition and invoility to . Do the required syments. Briofly stated, it migage from the miner nd the syliance that at the time in order for temperary allways 10,0001; to years a to totaces at any troffer a boustes way gest from the Mingaen Plow Company, and a selecty of [1000.00 lo for medaot ine fliv dand out taking asteuri a as tasy in no u sar il drii da lisocessi; and lint it was u on gray CO.Oni gray of tolto all fait empont fait to siess . " record to sounce this on had as it and taken course of no property exospt his interest in the estate of his idou ni nevievai noum empered had sistes end tant (redita) and firensial fillicultive; that the true teas of the oringe ad newbers of the Mispagn flamily hed usen compelled to meor definance origins of agreeme the profibero did ste. defountfor of depiles was dealered tout (moitateil wier two salaries and join with the other members of hiz To themyed and ack shouldarildo Lonoures paintuosi di vili the debts, and that the chois family were in a sturgel to proserve the Kingram estate from lestruction; that he had no macha of complying with the order, and thangfore ted net funion thus one take befor the estronyog somiuper est alor. are arthraid moment out tail howard and begundouth to min autor ten ha introev himbel truoc al' tadi has meitited & or modify the order herefolors embersu, or at later to have the emount of avely only not so to that it the focus of the court, on a hearing of evidence, high in properties in the promise and the particular partic or. Ist to paint (when it is the sit or of manys to ordered and orderit. A tark of the test and the test of Street 1 Journal to Whiteh Life and at 50 of galling the

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The court refused to act on the petition to modify the order prorently on the theory that appellant had no standing to ask any relief while he stood in contempt for failure to comply with the order to pay the past due alimony.

Much of the history of these wartise resited in our

clinions pefore referred to a pears or may be fairly inferred from the record before us. Martin Kinaman was a can of teputed great wealth, who died in 1904. He carried life insurance from which appellant fot a considerable sum shortly after his father's death. Appeldant had other property at kha ki that time which he had quite likely acquired because of his connection with a wealthy family. He had an income derived from salaries paid him as an officer of the different companies in which his father was interested. The father's property was placed in trust and there was supposed to be a large amount coming to appellant at the termination of the trust, December 19, 1914. At the time of their marriage appellee supposed that appellant was a very wealthy man, and he with a parent reason, believed that he was. They each had extravagant tastes and the available funds of appellant were soon dissipated. The trust estate left by Martin Kingman became involved in debt and financial difficulties, and passed largely under the control of creditors. Whather the Kingman net estate is of any value cannot now be definitely stated, but there is no question that it is in a condition that ev ery party interested in it as beneficiary or creditor must be diligent in its preservation. Under such conditions salaried officers whose services can be dispensed with are not permitted to had their offices and draw their selectes. We are of the ovinion that appellant was not decrived of his salary and means of supporting himself and his vife from any

The court refused to not or the politica to no lify the order planearly on the sheary that application had no strating - ask any relief while he steed in contempt for failure to A CHARLE SECTION OF THE SECTION OF SECTION O the state of the s puted great wealth, tho jied in 1806. He carried lift inca. ";; his father's desth. A retient had other property at the his ind to seurced besigner yield likely adquired because of his connection with a weelthy femily. He had an income actived -moc entrace poid him as an officer of the difference companies in which his dather was interested. The forher's property was placed in trust and there was supposed to be a large smount coming to sevendent of the termination of the - t, Desember 15, 1814. At the time of their terrings Les augoossa that systiant was a very worlthy man, and . Tith a gurent revean, botteved that he ame. They each had entravagant thetes and the available funds of he estent thegaventre seen dissigated. The trust cetate left by Maria Winran becease bar, asidfucinith Internation and the two values as largely under the control of creditors whichier the Winness now estate is of any value cannot now be definitely stated. but there is no juestion that it is in a condition that sv szy party interested in it we breeficiary so or situs were anotitions and resonution. Under such at interesting are drive heart. A and more applying a point around obstruct A STATE OF THE PARTY OF THE PAR

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... other-than legitimate business natives. So far as the record shows there are no children born of the marriage and in the present condition of the Kingman estate it is not only proper but very necessary that both of the parties to king this litigation should learn to live in a much less expensive manner than was anticipated at the time of the marriage or necesmary even at the time that the order for te porary alimony was entered. While \$20.00 a week is no doubt a very moderate allowance for the wife of a wealthy man and may have been proper for the wife of a man with an income of \$2000.00 a year and no other property, though it is beyond what is usually given under such circumstances, it should not be expected from a man of no property and no income struggling to save a large estate from financial disaster. The wife is entitled to the allowance because she is the wife and shares the fortunes of her husband, and she is under as much duty to fit herself to changing circumstances as is the husband. On the record before the court an allowance of \$5.00 a week was sufficient under the then existing circumstances. The rule is that the allowance should be made with a view to the income of the husband, and when it will result in diminishing the satate from which the income is derived it will not ordinarily be permitted to extend beyond providing for the actual wants and necessities of the wife. (Harding v Harding, 144 Ill. 508; Harding v Harding, 180 Ill. 481,582.) There is no question that the order for alimony is under the mantral constant control and supervision of the court and may be changed from time to time as conditions change. In Welthy v Welthy 195 Ill. 335, Cole v Cole, 143 Ill. 19 and authorities there cited, and in many other Illinois cases the power of the court to control and change orders entered

Propor all as as of .coming assessments it. in a BUT IT THE RECOVERY OF THE SHOP DETECTION OF THE PERSON throw wine for al if pratal mangair sai to notifiace trace but very necessary that both of the carties to kine this ; the gation should learn to live in a much less excensive manner -season to stain as each to emit ent to betaquoiding com me - monife yrares at mo: raine as fait amid aff to nove yr a entered. Thile (DC.00 a tight no souch a very mederate . lowerce for the wife of a menthy see and say have born year and no other property, though it is nevera what is usually given under ruch circumstances, it should not De expected from a mun of no property and no income etru -io suve a large escade from Minamoial Misagrer. The is untitled to the allowance becomes she is the wire i slares the fortunes of her husband, and she is under as much duty to it's harself to changing circumstances as in the lucesmis On the reservation of the court am allowing or \$3.00 - resk has sufficient under he t on entabler ofreunrances. The rule is that the antewards should be sude with discount if the the or lan . Emedeud ent lo smoont out of welv a Lovinous of empent one hold was estates out and atminist ni galeivers as eyed basens of pellinnes, so yelaratine ten ille ti low file sotool ventered recessivity of the wile. (deciing t arding, 184 Ill. 588; Marcing v harding, 180 Ill. 181,581,) There is no question that the eries or illineny to unlar that incite it nonsiryease and forbide thatases farinal sit and may be changed from time to wime as Johi items : ong. Welthy v Welthy 185 Lil. Lop, Ocia v Celo, las I.I. 18 ... mitica there sited, and in ... where illinois process of the ในจะปก- เพลิกขอ สุภายเลย (:) มืองปกคุย อกิ ===

for payment of permanent alimony is recognized and discussed. and with some exceptions that need not be noted here, it is settled law that the court may, from time to fime, make such orders as the exigencies of the case require. We assume that while it is true that appellant is now earning no salary y i has no income and is day, ting his energise to the preservation of the Kingman estate with the hope of snabling himself in the future to have a considerable property and snjoy a substantial income, yet that he is a man of sufficient ability so that he can in some way earn acmething for the support of himself and his wife. It is to be presumed that she is an intelligent woman with some capacity to contribute something to her own support. She must at least in this period of financial misfortune make sacrifices that are required of all people under such conditions. Appellant had paid the install. mente of alimony to April 34, 1915. He filed his answer and petition for a modification of the order June 14, 1915. There was then about seven weeks or \$140.00 of payments in default. Whether the court should have relaived appellant from the ap payment of installments due before he asked for relief presents a question that we will not decide because the amount is probably within the power of appellant to meet within some reasonable time in the future, but we are of the opinion that the court should have reduced future payente from \$30.00 a week to \$5.00 a week from and after June 14, 1915, the date of the application for such reduction. We are also of the opinion that the record loss not justify the order committing appellant for contempt of court for . . ilure to take the attack and area and area and area and and the cause remanded with directions to modify the order for temporary alimony so that appellant is required to pay

THE COURSE OF THE PROPERTY OF THE PARTY OF T if it some exceptions that need not be noted here, it is Hous than , out? of sait mon? , you do not bed! bed! Wal isidis: orders as the extrenoise of the case require. We assume out. while it is true that suppellant is now earning no salary and has no income and is day ting his amergisa to the preser-- its mildens to equal this hits attention of the state manyatt ... self in the future to have a somethereble recepting and anger a substantial income, yet that he is a man of sufficient coiling - that he can in some way sarn sensiting for the support ou an and himself and his wife. It is is or presumed that she is an and the contract of the contra to her own support. The most at least in this revied of in to bering or one that seculiariad size mutable in thiosenil . Ilatent end bing bed traffingen . anoitibnos dons rebnu elgos ments of alimony to April 34, 1915. He rited his answer and retition for a modification of the cruer June 14, 1810. There was then about siven weeks or [140.00 of payronts in teations have the armi finale touse of a weither . tipeles from the as payment of installments due betore he asked for the reed shired for illy sw tadt nottesup a stressing heiler amount is probably within the power of arreliant to meet thin some reasonable time in the subure, but we are . the opinion that the court should have reduced frient garwents from \$20.00 a week to 10.00 a week and amage of the June 14, 1915, the tate of the taptication or suba retrotter. s are also of the opinion that the recent lost not protain tor france so the admost of the flerge yearthing or actro e allure to make the illereal payrents. That could no mireral! rein, at walk to another all distremended some of the or bemyorary alimony so that a jestiont is required to july conly \$5.00 a week from and after June 14, 1915. The enforcement of the payment of the amounts here indicated must depend upon conditions hereafter arising from which the ability of appellant to pay may be shown and ascertained.

Raversed and remanded with directions.

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TATE OF ILLINOIS, ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
ourt, in and for said Second District of the State of Illinois, and keeper of the Records
nd Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
aid Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one thousand nine hundred and

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice O T.A. Christopher C. Duffy, Clerk.

E. M. DAVIS, Sheriff.

PH Dan May 12/16

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 3192.

Matthew Donaghue, appelled

VS

Appeal from LaSalle.

Edward J. Fraikin, appellant. Carnes, J.

Matthew Donaghue, the appellee, was riding along a public highway north of Ottawa just after dark July 9, 1809 driving a single horse attached to a top buggy. He was in a beaten path a little to the side of the center of the road because the center had been recently graded. As he was passing the premises of Edward J. Fraikin, the appearant, his buggy ran over a cow living in the road and was overturned.

A pelles was injured quite seriously, both bones of his ankle were broken, - a compound, comminuted fracture. He was confined to his house for a long time suffering considerable pain and incurring considerable expense for doctors' bills. His injuries are to some extent permanent. He brought this action to recover for that injury and had verdictend judgment for \$5.0.00 from which judgment the defendant appeals.

The issues of fact were stated to the jury at the instance of the defendant in the following instruction:-

"The court instructs the jury that before they can find the defendant guilty, they must believe, from a preponderance of the evidence,

First, that the plaintiff received the injuries complained of by him by having his buggy upset or overturned by a cow lying in the public highway:

Second, that the plaintiff himself was not quilty of a want of ordinary care for his own safety:

Third, that the defendant was the owner of said cow:

Fourth, that the defendant carelessly, negligently or unlawfully

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Appeal from Instille.

Eimard J. Fraikin, appellant.

Carmes, J.

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Methor Donaghue, the species, as riding slong a public highery north of Ottawa furt after destructed fully E, 1868 driving a single horse attached to a top buggy. He was is a beaten path a little to the side of the center of the series of the center of the measure the premises of Edward J. Fraikin, the inclinat, his buggy ran over a new liting in the road and was overturned.

A cere was injured quite seriously, both bones of his ankle were broken, - a compound, comminuted fracture. He was our lined to his house for a long time suffering considerable gain and from the injuries are to some extent paramenest. He brought this goin and injuries are to some extent paramenent. He brought this action to ricover for the injury and had versiotend juige-action to ricover for their injury as had versiotend juige-action to ricover for their injury as had versiotend juige-action to ricover for their injury as had versiotend juige-

The leause of feet were stated to the jury at the instance of the defendant in the following instruction:-

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Second, that the plaintif himself as not salty in want of oritary care for his can to bty:

Third, that the defendant so the control of a if see: curt, that the defendant sureleasy, negligating the defendant sureleasy, negligating

permitted said cow to run at large on said public highway;

Fifth, that the injury to the plaintiff was one which an ordinary prodent person should have foreseen would likely happen as a consequence of permitting a cow to run at large on a public highway, and unless the jury find from the evidence that the plaintiff has proved each of said requirements by a prependerance of the evidence, the jury should find the defendant not guilty."

There can be little controversy that the evidence sus tains affirmative findings on the first and second propositions. There was a decided conflict of evidence as to the third whether the defendant was the cwner of the cow. The evidence showed that appellant had anumber of sows kept on his premises; that at different times before the accident they had been pastured in the road. One witness that appeared at the scene of the assident immediately after it happened testified that there was were two gows in the road there that he had before seen in appellant bend. The foctor that was called to the place said that appellant then and there said he felt, sorry to think it was his cow that was the cause of appelled's breaking his leg. It was so dark that appellee. did not identify the cow at the time of the accident, but he testified that he had a conversation with appellant after afterwards in which appellant told him that after taking him, /appellee, home that night he saw two of his cows coming lown the road from the north. This testimony was sufficient if believed by the jury, to support an affirmative answer to the third proposition. It is true that the evidence introduced by appellant indicated very strongly that his cows were in the enclosure that night and that it must have been someprovided allower in the country of the line letter.

Fifth, that the injury to has placental and one which an relinary product person about a have foreseen would likely a cycen as a consequence of permitting a cow to run at large and the religion of the company of the

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body's else cow that occasioned the injury. But we are satisfied that the evidence sufficiently warrant supports the jury's finding that it was appellant's cow to so bid the trial court or this court disturbing that finding. We think the jury were warranted in answering the fourth proposition in the affirmative. Appellant's counsel tried the case, as indicated by that proposition, on the theory of cases decided under the act prior to the present act (J. & A. Statutes, Chap. S, Sec.1, Par. 322.) holding that a domestic animal that has escaped from its enclosure without the owner's fault is not running at large, and they argue the case here as though the present statute, which is somewhat changed in its terms, did not change the rule in those cases. It is said by appellee that decisions under the prior statute are not applicable. Without deciding that question we will assume that they are, and that finding an animal on a public highway, unless the owner knowingly or negligently permits it to be at large, does not make a case of negligence. O. & M. R. W. Co. v Jones 65. Ill. 472; Myers v Lape, 101 Ill. App. 183; Morgan v The People 103 Ill. App. 257. Under that view of the law, which appellant is responsible for in this case, the court properly permitted proof of the custom of appellant permitting his domestic animals to run in the highway, and that they had been seen there unattended at other times shortly before the accident as bearing on the question of his knowledge and care. While there was a conflict of the evidence on this point we think it sustains the finding that appellant negligently knowingly and unlawfully permitted the cow to tun at large at that time and place. The fifth proposition was not susceptible of direct proof or opinion evidence. . It was a matter for the jury to determine from their knowledge of common affairs. We are entirely satisfied with their con-

anitar ore at this structured the injury. But is ere matter ent etrogras finitum ratericalitation constitue of tail bein jury's finding that it was ejemiliant's our to lo bit the tr'if an' Maini av .mail di fadi aldustall truso elde re truse ni maitisacere di muel suit princuene ch betarrata erea grut ing affiredtive. Appellant's count l'tris des, au indicated by Sint recreation, on 'no birear tois you be neither - der the act order to A . protint act (J. A A. Stabutse, Cit. () 30.1, Par. 500.) halding that a long orio aminal that has for al fluct o'wange sof fundite equations of more because st large, and they argue the case here as though the present statute, thick is equation to have the it interior, this not enouge the rule in theoso occase. It is a did by appeller, that decisions under the prior statute are not proliberels. Line verifical land a said on the constant pailibed book d that finding an entirel on a public highway, unless the an mingly or negligently germits it to be at large, A on not make a once if namilitance. O. & M. H. W. Co. v Jones 1. Ill. 478; Mysre v Lags, 101 Ill. 6pp. 186; Jornan v The sople 105 Ill. App. 257. Under that wish of the large which appealant is responsible for in the eres, the court property ing word first lan , wowdhil and ni nur of ale. ind circust been agen there unattended at other bines shortly helone in. brighten . ii o malikew add as imingod oa fmebiesa inis, this he so white all he defiless a contactiful term gifor higan a wallegge thois guiball car ontetone Hi wildt a -aut non har moitisogere filit eft . souly long soit fait de n the if . . senshive moining on hoon; for tit le eldi le therefored rieds north entacetal as yout ent tol m -acc wisil Atto bathottee vistitas and eW .ewi

clusion that a cow permitted to run at large on a public highway in the night time should be reasonably expected to lie down in the road and become a danger and retact to travel.

A pellant complains of the instructions to the jury In plaintiff's given instructions the jury were informed in substance that actionable negligence would arise from the defendant's "negligently and carelessly permitting hie cattle to be and remain upon the public highway in the night time" at the place in question. It is said that the declaration charges wilful misconduct and the instruction warrants a recovery for mere negligance and that the instruction dees not inform the jury what the facts must be to constitute cattle running at large. The instruction does not much differ from the statement of the law in defendant's instruction above ouoted. The defendant asked the court to instruct the jury that the plaintiff could not recover if he "could by the exercise of reasonable and ordinary care have so driven his horse and buggy prior to and at the tire in question as to have avoided the accident." The court modified the instruction by inserting the word "just" before the work "prior" so that the jury's attention was directed to the conduct of the plaintiff as he was approaching the com. To be to error in this as applied to the facts in the case. There in reass for inquiry whether the plaintiff was negligent in this that road or diving a surrespect the horse, of something of that kind that might arise in a pass that muld call for an inquiry as to the plaintiff's conduct to the before the accident. The evidence showed that ... it is had driven to town about two hours before the ... 11 t ... t had drink a glass of beer there. There is some aug intlin in the argument that he may have been intoxicated, though

Lie down in the road and hecome a danger and renace to

Appellant complains of the instructions to the jury In plaintiff a given inetructions the jury were informed in whatance that actionable negligence would arise from the sfendant's thegligently and corelessly permitting his sattle to be and remain upon the public highmay in the might . se" at the place in question. It is said that the dealerstion stanger acitourater of has tembacosim full a serials a recovery for mere negligenee and that the instruction cars not inform the jury what the daste must be to constitute doun ton sect noticustant effr. frank to granur I . .iffer from the attement of its law in defendant's instituetaciffed of four bold little died blok etc. sterou 1980, 1931 the fury that the plaintiff sould not resoure if he "could by the unnestee of rescondble and ordinary sure have so triven his horse and hurgy order to and at the time in question as to have avoided the accident." The court modified the Party Jee of pill the transition of pile and the personnel so that the jury's attention was directed to the conduct of on see of wor id paidosouggs arm of as littinially edierror in this as applied to the frate in the nees. There was no voom for inquiry thather the plaintiff was negligent in taking that road or driving ac a unrangeable horse, or something of what kind that might arise in a case that would call for an inquiry as to the plaintiff's conduct acrostics listed and the level the syline the tent the the cole of and driven to form about two house selves the testines and had drank a glass of beer there. There as some auggestion druodt that he are been intoxicated, though

very little ground for such an assumption. The modification of the instruction did not reclude that inquiry by the jury, if, because he was intoxicated he had failed to see the cow he would not have been exercising care at and just before the time of the accident. Other instructions offered by the defendant were refused. So far as applicable they were covered by instructions given. The case was given to the jury under a fall and fair statement of the law, as claimed by appellant. Finding no error in the record the judgment is affirmed.

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the instruction lid not reclude that inquiry by the gry, if, because he was intermeded as had failed to associate cow he would not have been exercising ears at and fust the the time of the adoldent. Other instructions

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EMAME OF ILLINOIS
STATE OF ILLINOIS, ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



6212

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6319.

John D. Connors, aposllant.

va Appeal from Co. Ct. Will.

Henry Winke, appelles.

Carnes, J.

Appellant John D. Connors, and appellee, Henry Winke, were riding on a public street in the city of Joliet, each driving his own automobile. They get at the intersection of another street and there was a collision in which appellant's car was injured to the extent, he says, of about \$310.00 but much less according to the testimony of appellee's withnesses. He brought this action to recover for that loss and a jury trial resulted in a judgment for the defendant, from which this appeal is prosecuted.

Appellant's main contention is that the verdict is not supported by the swidence. - Each of the parties testified on the trial, and made it quite plain, that he was driving his car slowly and with care, and the other party was driving in a reckless manner and entirely responsible for the collision, Each party was corroborated by other witnesses, and there was, as is usual with such accidents, a contrarity of evidence as to what happened, and where and why. It is a surprising trait in human nature that intelligent, truthful witnesses will differ widely in describing a transaction of this kind. It will serve no useful purpose to relate the testimony in detail. Appellant cites several authorities in support of his proposition and then the weight of evidence is clearly and manifestly against the verdict it is the duty of the lower court to grant a new trial, failing in which the judgment will be reversed upon appeal. This is undoubtedly the law, but upon an examination of the record we are of

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THE PERSON NAMED IN COLUMN

arnos, J.

Assellent John D. Connors, and assellent Forry Tinks, rere riding on a public atreet in the oity of Johns, each driving his own automobile. They ret at the intersection of another atreet and there was a collision in absolution of another atreet and there exist, he says, we hout the families out much reasonable to the testimony of argelles's ancesse. We brought this cotton to recover for 'at lose and a jury trial resulted in a judgment for 'he islen ant, from which this appeal is prosecuted.

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the opinion that the weight is not clearly and manifestly against the weight of the evidence, therefore we would not be justified in reversing the judgment on that ground.

It is argued that the court erred in permitting witnesses other than experts to testify on the question of the amount of damages. We do not see that that evidence, whether proper or improper, affected the question of liability, therefore it is not necessary to discuss that action of the court. It is also urged that the court erred in admitting photographs of the street where the occurrence happened without sufficient proof that they showed the condition at the time of the accident. We find nothing in that testimony that in our opinion influenced the verdict of the jury adversely to appellant. Photographs, diagrams and drawings are often proper, not as evidence within themselves, but for the purpose of enabling the jury to understand and apply the testimony. Reinke v Sanitary District, 260 Ill. 380, 387, and authorities there cited.

One of the grounds upon which a new trial was aksed was that of newly discovered evidence what which was largely sumulative in its character and does not seem to be much relied on by appellant. He only abstracts the affidavite as to one of the witnesses and says in the abstract there were similar affidavite as to five other witnesses. No reason is given or suggested why these witnesses were not produced on the trial, therefore the court did not err in disremarding those affidavits.

No complaint is made as to the instructions to the jury. We find no substantial error in the record, therefore the judgment is affirmed.

Judgment.Affirmed.

the opinion that the weight is not alsorly and anifestly against the weight of the swittens, therefore we would not be justified in reversing the judgment on that ground.

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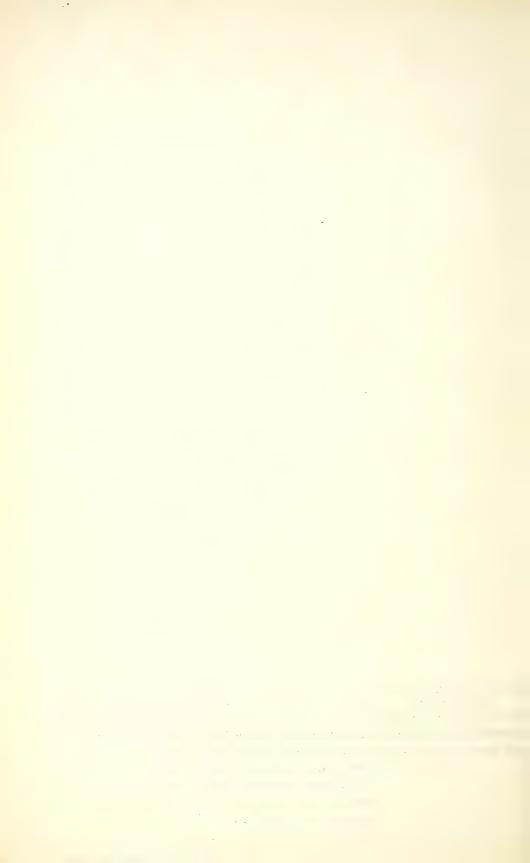
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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



6100

AT A TERM OF THE APPELLATE COURT,

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CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

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Gen. No. 6159

Henry Forbes, appellac

vs Anneal from Livingston.

Veleste A. Davis, appellant.

Misimus, J.

In this case Henry Forbes, the appelles, recovered a judgment in the Circuit Court of Livingston County, against Celeste A. Davis, appellant for \$173. which amount he claimed was due him, as commissions for getting the purchaser for a farm, consisting of 173 acres, which appellant sold.

There is a sharp conflict in the evidence as to the terms of the contract upon which the claim for commission is based. Appelled claims that appellant agreed to pay him a commission of (1. per abre for finding her a purchaser; and that she fixed the price of the farm to be sold, at (130 cer acre; while appellant claims, that she agreed to pay the commission named, only upon condition that the purchaser whom appelled shourd find for mer, sould pay the circle of the farm.

The evidence tends to show that the purchaser of the farm, to whom appellant finally sold it, for \$125 per acre was procured through the instrumentality of appellac; that is to say it was appelled who induced this purchaser to visit appellant and the farm, with a view of buying it. One of appellant's defenses, however, is that before she sold the farm to this party who finally fid purchase it, appelled deceived her into believing that this purchaser was not one which appelled had procured for her; but that the had brought with him the person whom he expected tobring about the sale

SELS . CT . MSD.

PRINCIPAL PROPERTY TANKE

vs Arpsal from Divingation.

Niehaus, J.

In this case Henry Forbes, the appellas, recovered a judgment in the Circuit Court of Livin ston County, and not Celeste A. Davie, appellant for \$175. which amount he claimed was due him, as commissions for getting the purchaser for garm, consisting of 175 acres, which appellant seld.

There is charp contined in the evidence as to this terms of the contract uson which the claim for continion terms of the contract of that assed and agreed to may him to constant of the farm to be said, at (150 mg that she fixed the price of the farm to be said, at (150 mg core; while separate olding, that she agreed to pay the commission named, only upon condition that the purchaser whom appelled should find for mer, would pay the whom appelled should find for mer, would pay the chart of anotice of the core was grid by such for the a condition that for the condition that the first and that fact of the condition that for the condition of the con

The evidence tends to show that the purchaser of the form, to thom asymptems finally sold it, for (155 mer nert sea procured through the instrumentality of a clies; the is to say it was poyether who induced this purchaser to visit aspecilant and the farm, tith a view of buring it. Ord and the farm, the that buring it, ordered and this party who finally sid purchase it, the farm to this party who finally sid purchase it, the interpretation in the procured for the purchase it.

of the farm for her; and wanted her to make a contract with him in reference to the matter.

The appellee denies that he made any statements to appellant to that effect; or that he told a pellee that this purchaser "was not his man". It became therefore, a question of fact for the jury to passupon, in connection with all the other evidence in the case, and to determine xxxxx where the truth of this matter lay. If it be a fact, that appellee concealed from appellant, by a false statement, that the person who, at that time, was trying to purchase the farm from her, was a purchaser procured by him; and that appellee was threby induced to afterwards sell the farm to him, for less that the amount she would otherwise have exacted, then appellee would not be entitled to recover commissions, even though the terms of the contract were found to be as claimed by him. (Hafner v Herron, 185 III. 242.)

Instructions 7, 8 and 9, which were given for appeller, purport to state the facts that would authorize a recovery, and a verdict for appellee; but completely ignore the matter of defense above stated. An instruction which purports to state all the facts necessary to a recovery, and ignores the matter of defense of which there is proof, is erroneous. (Mooney v City of Chicago 339 Ill. 414; Miller v Cinnamon, 168 Ill. 447; Lee v Quirk, 30 Ill. 395.)

For the error indicated the judgment must be reversed and the cause remanded for another trial.

Reversed and remanded.

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STATE OF ILLINOIS SECOND DISTRICT.	, ss. I. Christopher	C. DUFFY, Clerk of the Appellate
Court, in and for said Secon	ad District of the State of	Illinois, and keeper of the Records
and Seal thereof, DO HEREB	Y CERTIFY that the foregoing	ng is a true copy of the opinion of the
said Appellate Court in the	above entitled cause, of re	ecord in my office.
		I hereunto set my hand and affix the
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Gen. Ho. 6181.

THE JOHNSON OIL REMINING
COLPANY, (a corporation)

Appellant,

CALESBURG RAILWAY, LIGHTING
& POWER COMPANY, (a corporation),

Appellace.

HIMHAUS, J.

This is a suit commenced by The Johnson Refining Company, appellant, against the Galesburg Railway, Lighting & Power Company, appellae, in the circuit court of Know county, to recover damages alloged to have been sustained on account of a collision between a street car operated by appellee and an automobile truck belonging to the appellant, appellant claiming that the collision was the result of appellee's regligence.

of the declaration. The first count charges that the ap elber, by its agents and servants, at the time of the collission, failed to have the street ear under preser control; the second count avers the appelled, by its agents and servants, failed to give proper warning of the approach of the ear; and the fifth count alloges that appelled, by its agents and servants, failed to keep a proper watch and look-out as the car approached the intersection where the collision occurred. There we jury trial, which resulted in a verdict finding the appelled not guilty. The appelled in a proper was a motion for a new trial, which was denied by the court, and judgment was thereupon entered against the appellant

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operates a single track street car line along West Main Street in the City of Galesburg, and that Cedar Street intersects West Main Street at right angles, running north and south; that half a block or about 195 feet east of Cedar Street the street car track forms a loop around a public square, which is assed as a switch, and in the usual operation of the street car line the west-bound cars circle around the north side of the square and then wait on Main Street at the entrance to this loop, or switch, for the east-bound cars to pass onto the loop.

On the day of the collision and just before it occurred a vest-bound car was standing at the point mentioned on the ewitch, waiting for the east-bound car to turn onto the switch and clear the track. At the sale time appellant is automobile oil truck was standing on the northerly side of West Main Street near the curbing, about 75 feet east of the easterly line of Gedar Street, and about 120 feet west of the standing street car. This treuk was a very large one, about 18 feet long, and weighing 8000 pounds. It contained an oil tank 12 feet in length and 4 fert wide. The driver of the oil truck came out of a blacksmith shop, in which he had transacted some business, to start the truck. When he came out he noticed the west-bound car standing on the switch and saw the east-bound car coming along West Main Str et. When the east-bound car got to the Cedar Street crossing he started the michine of the truck and then put on his gloves and mounted the truck, and looked back once more after mounting and noticed the west-bound car still standing on the switch. When

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the east-bound car passed him he started his truck and drove it west on West Fain Street until he got past the middle of Cedar Street, then turned the truck south, making the turn as quickly as he could to cross the street car tracks, but without looking at the approaching street car, which he knew would be along, and without previously indicating that he was about to turn. He had partly crossed the track when the west-bound car struck the truck at a point just in front of the hind wheels, and wreelying it.

by the prollect, been in the character of the street car line, at the place mentioned, and he had also been connected with the running of the sale car which collided with the truck. He admitted that he know that the ear stationed at the switch would start vesterly as soon as the east-bound car passed the switch, but testified that he thought he had sufficient time to make the turn at Cedar Street and to cross the tracks before the street car would reach him, but he did not make any attempt to ascertain whether it would or not.

As to whether appelled's motorman was guilty of the negligence charged in the counts of the delegation upon which the case
was tried, and whether the driver of the automobile truck was
guilty of contributory negligence which contributed to bring about
the collision were questions of fact which can be determined only
from the evidence, and the jury was best able to determine these
questions. Having seen and heard the vitnesses the jury was in
the best position to judge of the credibility of the witnesses and
of the weight to be given to their testimony, and this count
cannot say that the jury should have found differently on the

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ovidence presented. It is a well settled rule that the verdiet of a jury should not be disturbed unless it is clearly and manife thy against the weight of the evidence, which is not the case here.

Objection was made by an ollent on the trial to the introduction in evidence of sections 15 and 19 of the City Ordinances
of the City of Galesburg. Section 15 requires of drivers of
vehicles that " in turning while in motion or in starting to turn
from a standstill; a signal shall be given by indicating with the
whip or hand, the direction in which the turn is to be made;" and
section 19 provides that " traffic on the east and west street
shall have the right of way over traffic on the north and south
streets."
There was no error in admitting the sections of the
ordinance in evidence.

Under subdivision 9, article 5 and chapter 25 of 1 Jones & Addington's annotated statutes, the City of Galesburg had power to pass ordinances of this character, to regulate the use of streets by vehicles. These sections of the ordinances are reasonable, and the requirements are a proper regulation of traffic on the streets of the city, and if obeyed would undoubtedly promote the refety of vehicles asing the streets and perhaps prevent collisions and accidents. A violation of the ordinance was a circumstance proper to be considered by the jury in determining a question of contributory negligence.

A number of the content of appeller of the fit was error to give the 7th and 12th instructions for appeller, which are as follows:-

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"7. The Court instructs the jury that if you believe from the evidence that the driver of the auto truck in question, as he approached the street car track crossing at Cedar Street on Main Street, yould by the exercise of ordinary care, have ascertained that a street car was approaching the intersection of Cedar and Main Street, and yould by the exercise of ordinary care, have prevented the auto truck he was driving from passing onto the street car track, and from being struck by the street car at the intersection of said streets, then your verdict must be for the defendant."

"12. The Court instructs the jury, that if you believe from the evidence that the driver of the auto truck in question, by the exercise of ordinary and rear enable care for the safety of the motor truck he was in charge of as he approached the crossing in question, yould have seen and known that a car of the defendant was coming, and would have avoided the accident by the exercise of ordinary care on his part, then and in that case, even if you should further believe from the evidence that the defendant's servants in charge of said car, failed to give any signal of the approach of said car to said crossing, yet the plaintiff cannot recover in this suit and your verdict should not for the defendant."

The instructions cet forth are not subject to the criticism made by the appellant; they did not take from the jury the consideration of the question of whether or not the truck driver, just before and at the time of the collision, was in the exercise of due care, but submitted the question to the jury whether the exercise of ordinary care on the part of the driver of the auto truck would have required him to ascertain that a street car was

IV. Die Grunt indered bie der die jung viet in group biliere from the ovi out of in group biliere of iron the ovi out of the file of the ovid out grandlier of the object of the object

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approaching, and whother the exercise of ordinary care on his part would have prevented his driving onto the street car track and have avoided the collision. Instructions of substantially the same import have been repeatedly sustained by our supreme court. (Chicago City Railway Co. v O'Donnell, 208 Ill. 267; McEniry v Tri-City Railway Co., 179 Ill. App. 152; Chicago Union Traction Co., v Dibvig, 107 Ill. App. 644; Scanlon v Union Traction Co., 127 Ill. App. 406; Weber V C.B.& Q.Railway Co., 142 Ill. App. 150.)

Appellent also us ims for error to giving of I. instruction, which is as follows:-

"The Court instructs the jury that in order to entitle the plaintiff to recover in this case from the defendant, two things must concur and appear from a preponderance of the evidence.

First. That such defendant was guilty of negligence wich caused the injury complained of, and

Secondly, That the driver of the auto truck in question exercised reasonable and ordinary care for the safety of the auto truck, and of the plaintiff fails to establish both of these essentials by a presenderance of the evidence, your verdiet must be for the defendant."

The ibjection made is that this instruction in no way fixes the time when the driver should have been in the enercise of ordinary care, and that it eliminates entirely the proposition of equal rights at a crossin. In the atter of fixing time, the instruction must be considered with the other instructions given in the case and when read in that connection the time is definitely fixed. For does it eliminate the proposition of equal rights of parties at the crossing. Parties are chargedwith the exercise of due care, when driving vehicles over a crossing, as

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interaction, which as as solitones:-

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well as elsewhere.

The objection made to the giving of the 10th instruction for appellee are not tenable, for the reasons above stated.

An objection is also made to a modification by the court of the 12th instruction given for appellant. The instruction does not embody a correct statement of the law, and the modification did not harm the appellant.

We are of opinion that the instructions, taken together, state the law applicable to this case with substantial correctness, and that no error was committed either in the giving of instructions nor in the modifications made by the court. The judgment should therefore be affirmed.

Affirmed.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
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Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

May 12/16 117 1- Exercised

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APR 1 4 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
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Ger. Ho. 6190.

William Friedberg,
Appellant,

Clarence E.DoPow, doing business as the "Practical devertising Company", and John R.Henderson, as Sheriff of Kondall County, Illinois, Appellees.

Appeal from Kondall County.

HIEHAUS, J.

In this case, a bill in equity was filed October 14, 1914, by appellant, in the direct court of Kendall County, to restrain the enforcement of an execution, issued upon a judgment rendered against appellant in the circuit court of Sangamon County. The bill alleges that on or about February 14,1914, the appellae entered into a contract with appellant through appellant's agent whereby appellae, by the name of "Practical Advertising Company", agreed to furnish to appellant certain articles of merchandise, and perform certain acts to benefit appellant's business— the appellant bein a merchant in Your-ville, Kendall County, and that appellee guaranteed thereby to increase appellant's business. A copy of the contract referred to 11 attached to the bill as an exhibit.

The bill further allegs that appollant entered into this contract with appellee, "only in consideration" that appellee should in good faith earry out and perform terms and conditions of the contract on his part; and that appellent's business should be thereby increased over the business of the corresponding months of the preceding year; and that appelles,

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through its agent, and otherwise, proposed and guaranteed said increase in business, and proposed said plan solely for the purpose of increasing appellant's business; and that although appellant entered into said arrengement for the sole purpose aforesaid, his business, instead of increasing, decreased during the months the plan was in operation, to the amount of nearly \$1000, as compared with the business of the corresponding months of the preceding year; that appelles utterly failed and neglected to perform the terms and conditions of the contract in good faith and thereby also failed to cause any increase in appellant's business, although appellant, on his part, did all in his power to carry out the purpose of said contract.

The bill further alleges that appellee failed and neglected to make up to appellant or to account to him, for the money lost by him as appelled was bound to do by said contract, to the extent of 400. The will instant at res think it is on two, 1914, and the state of the of the state of the sta county, the appelloe as "Practical Advertising Company" procured to be ontered, by some means unknown to appollant, a pretended judgment against him in the pretended sum of \$440, with costs amounting to \$5.40, all without the personal knowledge of appellant; but, as he has since been informed, and upon such information states the windthat it to be a fact; and that on or about July 14, 1914, a pretended execution was lasted by the clerk of the circuit court of Sangamon county, upon said pretended judgment; that afterward a pretended execution was placed in the hands of the sherif of Kendall county, for service, and that the sherif served the same upon appollant on or about August 14, 1914; and then,

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on or wour Teptemer 30, 1911, lovied it upon certain to 11, the which is the property of appellant situated in the village of Yorkville, in Kendell county; that this levy by the sheriff was entered of record, and still remains of record, to the prejudice, injury and damage of appellant in his business and reputation, and constitutes a cloud upon his title to the premises levied upon.

The bill also alloges that the appelled proposes and threatens to instruct and direct the sheriff to publicly advertice and sell the premises levied upon under and by virtue of said pretended execution and levy, and that the sheriff threatens to so advertise and sell the same, and thus further cloud appellant's title and further injure him in his business, property and reputation, and that appellant fears they will carry out their threats unless restrained by the order of the court.

The bill also over the the service of the assertion on modification that it is a summons or other process having been served upon him previous to the entering of the judgment, and that the May term, 1914, of that court had adjourned for the term before the time mentioned, and that it was only from the alleged pretended executionthat he learned that the sum of \$440, with interest from June, 1914, had been so recovered against him by appelled in an action of "assumpsit-confession", in the circuit court of Sanganon county, together with costs to the amount of \$5.40.

The bill also states that appollant never, to his knowledge, executed or signed any judgment note authorizing the judgment, and that in case such judgment note emists, or ever existed, containing his signature, such signature is a forgery; or, if remaine, it was

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appelled, or either of them, from further levying said alleged protended excession; and from otherwise enforcing, or attempting to enforce the same.

To this bill the appelled interposed a desurrer, which the court sustained, and theroughn entered an order dismissing the bill for want of equity, from which order appellant presecutes this appeal.

It appears from the bill that the exhibit at ached to the bill as the contract entered into a wreek sumably only a part of the entire contract, and to the part ciqued by the angellor: but that evidently at the same time appointed signed another paper, which is not attached to the bill. / Wiere two papers signed are a part of the care transaction one signed by one party to the contract, and the other by the other arty to the contract, both process constitute one contract and are to be considered as one instructors. He reason is given why a copy of the other eart of the contract, which may have a note and power of attorney, and the institution upon which the informat was entered, is not attached to the bill. Horeover, the allegations in the bill in reference to signing such officer income out are inconsistent, for appellant alloges that if the paper contains his signature it is a forgery, but if the dignature is genuine is w obtained by misropresomation, fraud, false protences and circumvontion. There is no positive allegation that the signification is a forgery, nor that the signature two paraine, but obtained by frond and migre-order total on. Her are the fireformed upon to leb the claim of froud and micropa went thon are based, and the allogations are clearly incufficient. Thile equity takes concur ont

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jurisdiction with law courts in a trees of fraud accident or mistake, the facts constituting such fraud, accident or mistake, as a defense to the priorecent of a judgment, must be set out in the bill. (Jasher v Annuziata, 119 Ill. 655).

Moreover, to entitle a defendant in a judgment to relief against such judgment on the ground of fraud, accident or mistale, it must be evident not only that he had a defense upon the merits, but that such defense has been lost to him without such loss being attributable to his evn omission, negligence or default. (Ward v Durham, 154 Hll. 195) Furthermore, it is apparent that appelled had a complete and adequate remedy at law. The allegations of the bill do not shiw any valid reason why appellant could not with reasonable diligence have filed a motion in the circuit court of Sangamon county, and upon a proper shiping to the effect that his only knowledge of the entry of the judgment had come to him after the final sudgement adjournment of the term at wich the judgment was entered, have asked the court to open the judgment and give him leave to plead, and make the legal defenses which he claims to have to the entry of the judgm nt. A motion even to vacate a judgment filed at the next ensuing term after the confession of a judgment is in apt time. (Wingman v Reinemer, 58 Ill.App. 174)

And if the matter simply involved an improper Levy of an execution his remedy would have been by application to the court issuing the execution to quash the levy. (Palmer v Gardiner, 77 III. 145)

But the purpose of the injunction prayed for is to stay proceedings at law, and the statute requires that a bill having such a purpose in view should be brought in the county where the proceedings at law were had, which in this case is Sanganon

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county. The circuit court of Mendall county, therefore, had no jurisdiction to entertain the bill, even though the bill had contained sufficient averments to give appellant a standing in a court of equity.

For the reasons stated we are of opinion that the demurrer was properly sustained, and that the court did not err in dismissing the bill.

Decree affirmed.

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STATE OF ILLINOIS, ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, no hereby certify that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.
Cierk of the Appetitie Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 1 4 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



Gon. No. 6197.

August Cellarius, &c. appellant.

VB

Aspeal from Will.

Amenda Junker, a orlice.

Niehaus, J.

In this case, whill in equity was filed by August Cellarius, in his individual capacity, and as administrator of the estate of William Callarius, navinst Amanda Junker, asseled to set aside a change of beneficiary made by the deceased, for the benefit of expelles, in two, life insurance policies, and to enjoin the payment of the policies to appelles.

The bill alleges, that William Cellarius, the deceased had taken one life insurance policy in the National Life

Association, of DesMoines, for \$3,000 in which appellent, the brother of the deceased, had originally been named as beneficiary; and another policy had been taken out by the deceased, in the New York Life Insurance Company, for the sum of \$1000 in which the mother of the deceased Mary Cellarius, had originally been named as beneficiary; that Mary Cellarius fied about four years prior to the filing of the bill; and that by a change in the beneficiary, these policies had become payable to the appelles, and were in effect assigned to her, and that the deceased, in his request for the changes of beneficiary, had designated appelles as his "Fiances".

The bill also charges, that the counge in the teneficiary or assignments of the policies, were produced by the peller through fraud and undue influence; also, that the deceased did not have, at the time of making the changes mentioned sufficient mental capacity for the transaction of ordinary business. The fraud charged, is that appelles pretended to

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Wichaus, J.

Lile, in his individual sepasity, and calcaministrative to take of William desiration, agained Amenda Junker,

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ficiary, had designated services as his "Tianors"

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be in love with the deceased at the time; and by misrepresentation and deceit in that regard, she unduly influenced the deceased, and by these methods caused him to make the changes.

Issues of fact were made up, and submitted to a jury and the jury returned a verdict, finding against the contention of appellant. The court sustained the findings of the jurys; and entered a decise finding that appellae was the afficient wife of the deceased, and as beneficiary of the policies, was entitled to the proceeds thereof, which proceeds, by stipulation, had been paid into the hands of the master in chancery; and from this recess an appeal is measured.

There he no question raised in the case as to the regularity of the change of beneficiary or assignment; it being stipulated by the parties, that the policies were duly assigned to the appellee in conformity with the rules and regulations of the respective insurance companies.

There is no evidence in the record to sustain the charges made in the bill, of fraud or undus influence; but there is evidence tending to show that the deceased, at the time of making the change of beneficiary, was mentally incompetent; a number of witnesses testified that the deceased, about the time he made the change, was incapacitated for the transaction of ordinary business; but there is a conflict in the evidence on that question. The deceased had had a stroke of apoplery in December 1912, prior to making the change, which had confined him to the house and bed for several weeks; but thereafter he was up and sround, and attended to some business; and in May 1913, he had another stroke, from the effects of which he died. The change of baneficiary was made on April 19th, and April 25th, respectively; that is to say, between

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lesues of their age, and submitted to a pury
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The court sustained the sindings of the jump;

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wife of the december, and see beneficiary of the policies,

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of criticary business; but there is a corfiliation to apoption

on that guestion. The decembed had bein a stroke of apoplexy

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 the first stroke of apoplexy which the deceased suffered, and the second one, from which he died.

From the evidence showing mental capacity, it agreema / that he made the arrangements for a change of beneficiary. after he had sufficiently recovered from the stroke to be un and around; he had resumed his habit of going to a certain store, where he would read the Chicago Tribune nearly every day, and could talk about things, about as well as usual, except that his speeck was less distinct than before the etroks; clas acring trie sile, as went to specific sters, and bought articles, which he wished to use, and talked twenty or thirty minutes with the keeper of the store, and appeared to be rational and mentally competent; that he met people on the street, occasionally, and talked with them; from time to time, went to his physician's office for treatment. It viso appears, that shortly before he was stricken the first time, he had collected several sums of money, due from members of a penevolent spoisty of which he was an officer, but had not turned the money in to the Society, nor given the names of the members who had paid it; but after he had sufficiently recovered to walk about, he went to the proper officer gave the names of the parties, and turned in the money. He also went to different places where he owed bills, and prid them.

"In a case of this character, where witnesses differ as to the mental capacity of the grantor and of his ability to legally transact business and to dispose of his property, the weight to be given to the testimony of the witnesses is wush more couldn't to be determined by any and of mostler with the could of review, which reads only the written evidence. The law is well established in this state, that where a cause is heard by the chancellor, and the evidence is all, or partly, oral,

the first stroke of apoplery which the descrated cutters, the escent one, from which he ripd.

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it must appear that there is a clear and palpable arror before a reversal will be had. In a case of this character,
where the issue is tried by the chancellor short a pure, so
where the verifict of the jury is only advisory and may be
set aside by the chancellor, the rule should be just as strong
that clear and palpable error should appear before the decree
should be reversed." (Biggerstaff v Bihherstaff, 100 III. 407.)

"It has been wisely settled in chancery cases, that a court of review will not disturb the finding of fact of the chancellor, unless apparent error has been committed; and the rule thus announced applies with full firm, although the chancellor has submitted the case to a jury for an advisory verdict." (Dowie to Driscoll, 203 Ill. 480; Elmeted to Nicholson, 186 Ill. 580.) It is not apparent from the record that any error was committed by the chancellor in sustaining the findings of fact in the verdict of the jury; and it is manifest, that while there is a conflict in the swidence upon the question of the mental capacity of the deceased, there is sufficient evidence to prove, that he was capable of transacting ordinary business at the time of the assignment of the policies.

Appellant also asserts that the evidence to show that the appellee was the fiances of the deceased, is insufficient; but we are of opinion that the record discloses sufficient proof, that prior to the assignments of the insurance policies, the deceased had been engaged to be married to appellee, and that this engagement was the real motive for making the assignment of the insurance benefits to appellee.

It is also insisted that the court erred in excluding evidence to show that appellae was playing pards, laughing and having a good time in the home of Mrs. Fred Gellarius, just

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Michelson, 186 III. &if.) It is not or sment from int sectal sat may export year downitted by the phenosilor in succeining of fact in the remained of the jury; and it is equalized, while there is a conflict in the swidened when the question of the mental caracity of the Jerowald, the dustion of the mental caracity of the Jerowald, the sufficient evitance to prove, first is the caracity of the section of the special of the company obtained at the time of the westignment of the positions.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk. 200 I.A. 11

E. M. DAVIS, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: on

APP 1 4 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 8314.

William Rako, appellee.

v a

Appeal from Kans.

E. J. & E. Ry. Co. appellant.

Niehaus, J.

This is an appeal in a case commenced by the appelled William Rako. in the Circuit Court of Kane County, against the appellant Elgin, Joliet & Factorn Railway Company, and G. Holland, to recover damages sustained by appelled, because of the death and sickness of some of his cows, which was caused as the result of certain negligence charged in appelled's declaration.

The declaration consists of an original and an additional count, in both of which it is alleged that the appellee, and one G. Holland, who was also a defendant in the trial court were in possession of adjoining properties, which were semarated by a division fence; that these properties joined to the right of way of the appellant Railway Company. That it was the Suty of the defendant Holland, to maintain the division fence between the properties, in proper condition, and has notwithstanding such duty, he parmitted sold lends to become out of repair, and continue out of repair, until it became dec yed and fell down; and that the defendant Railway Company negligently injured and damaged said division fence, and wrongfully removed said division fence, or parts thereof; that in consequence thereof, the cattel of said plaintiff got into the close of the defendant Holland, and there consumed the green corn growing therein, whereby they were injurate.

To each of the counts in the declaration, the appellant and Holland pleaded the general issue, and a special plea, upon which issues the case was tried.

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The deciseration constitute of the transferral and training to coat, the both of which it is alleged that the distance and ... in posissence of adjoining properties, which were seked by a division fonce; that these properties joined is right of way of the severent Railway Company. What the the judy of the defendent Holland, to entrude the Miralen - ce between the propertion, in process of Alberon, the talk . The tending such duty of no newitted will dend to hiptain saver of fitter, untagen to the continue in til it recess manurah yakilag damanalib dat tadi dan enwal = lgently injured and damages told division force, and The removed being district Conce, or grants 'horses': in consequence 'hervel, 'he entitel a' a'i a littli into the eleas of in descalant Mel and, our files sensuale THE STREET, AND ADDRESS OF THE PARTY AND ADDRE

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At the close of the evidence for the appellae, the appellant made a motion to direct a verdict filding the appllant not guilty, which motion was overruled; and the appellant, at the guilty, which motion was overruled; and the appellant, at the direct a verdict of not guilty, which was again overruled by the court. A verdict was thereafter returned by the jury, finding the appellant guilty, and assessing plaintiff's damages at the sum of \$400; and finding the defendant G. Holland, not guilty. A motion for a new trial, and in arrest of judgment were made by the appellant, and overruled by the court; and a judgment thereupon entered for \$400, against the appellant from which judgment the appeal is taken.

The proof shows, that the appellee was a dairy farmer and owned a number of cows; that these cows had been turned into a field which adjoined a corn field owned by Holland; that the corn field was separated from appellee's premises, by a division fence. This division fence was made by poets at in the ground, and wires strung along, and fastened to the posts; and it was built up closely to the line of appellantla right of way, but aid not join onto the right of way fence.

The evidence tends to show, that the division fence, at the time the cows got into the Holland corn field, was partly broken down; and that one or two of the posts holding the wires, had been pulled upand thrown Jown, with the wires attached, on the land of the appelles, which made a sufficient opening for the cows to get into the Holland field; and that while in there, the cows over-fed on the green corn; that in consequence, two of the cows died, and a number of them became sick, and were injured to such extent as to become less valuable. But the record does not disclose any evidence tending to purpose that appellant was guilty of the negligence charged in the declaration.

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i owned a number of sowa; that these cows had been there;

to a field which adjoined a corn field owned by Moliand;

tat the corn field was seperached from apportunities, by

a file ground, this wires atrung along, and fastened to the poster;

and it was built up plosely to the line of well-lianting state of way, but aid not join onto the right of way fanct.

The syidenes tender to show, the that division force, it is time the some get into the Helkend corn initi, the pertision got into roken down; and that one or two of the poste helfing the set, had been pulled again thrown, can, with the less issue theored, on the lend of the frequises, which prise a sufficient of ening for the some to get into the Bollens timing in the rest, the set, or energy at him or executions, the set of the set into the first in the set, the set, or energy that in tensequence, two of the set of this, and the free in the set of the se

The only evidence which connected the appellant with the matter at all, is to the effect, that about 3 weeks prior to the time when the cows became sick, some of appellant's fence builders had worked on the right of way fence, at the place in question; and had substituted woven wire for the barbed wire on the right of way fence; but there is nothing in the evidence to justify the inference that this work by the employes of the appellant, could have had the effect, even if it were negligently performed, to in any manner interfere with or disturb, or break down the division fence, which was entirely disconnected from the right of way fence; nor could it possibly have had the effect of pulling out any of the posts of the division fence. And the positive evidence all oes to show, that the employes did not in any way cause any of the posts of the division fence to be pulled out, nor cause any of the posts to fall fown or break down; or to be interforsi with, or disturbed in any manner.

Under these diroumstances there can be no recovery against the appellants; and the judgment therefore is reversed.

Judgment reversed.

Finding of Facts to be incorporated in the Judgment.

We find from the evidence that the appellant was not guilty of the negligence charged in the last-ratios.

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the matter etack, is to has effect, what hout 3 resks arior the the time when the same became aick, some of significations when the same or his right of may lends, as the place in question; and had authorituted weren thre for the burbed in question; and had authorituted weren thre for the burbed with on the right of way lones; and their same in the applayes of the applayer of the right of way lenes; which was untirely disconnected from the right of way lenes; or the roots of the division fance. And the right of way lenes; of the roots of the division fance. And the capture out any cause any of the posts of the division lenes to be pulled out, nor cause any of the posts of the division lenes to be pulled out, nor cause any of the posts of the follows or break sorm; or no be sound any of the posts of the follows or break sorm; or no be sound any of the posts of the follows or break sorm; or no be sound any of the posts of the follows or break sorm; or no be

Under these ofremastanese there san be no recerry against the appellants; and the judgment cherefore is reversel.

Tinding of Foots to be incorporated in the Judgmont.

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STATE OF ILLINOIS, SECOND DISTRICT. SECOND DISTRICT. SECOND DISTRICT. STATE OF ILLINOIS, SECOND DISTRICT. STATE OF ILLINOIS, SECOND DISTRICT.
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois: Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 1 4 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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e de la companya della companya dell

Gen. Np. 6043.

William Fleming, et al

appaliass.

VB

A peal from Will.

E. J. & E. Ry. Co.

appellant.

PER CURIAM:

One of the Judges of this court tried this cause in the court below; and the other two judges are divided in opinion upon the question whether the judgment should be affirmed or reversed; the judgment is therefore affirmed by operation of law.

Binder v Langhorst, 139 Ill. App. 493.

AND IN SEC

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A roal Jeen Mills.

I. J. C. T. Ry. Cc.

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One of the duction of the new two judges are divided in the court below; and the court judges are divided in the court below the questann influence in funguish the addition of the reverses and the confere additional by cylination of law.

Binder v Longberst, 138 511. App. 480.

	Clerk of the Appellate Cou	rt.
	thousand nine hundred and	
	day ofin the year of our Lord	lone
	seal of the said Appellate Court, at Ottawa, this	
said Appenate Court in	In Testimony Whereof, I bereunto set my hand and affin	x the
	EBY CERTIFY that the foregoing is a true copy of the opinion of the above entitled cause, of record in my office.	i the
	cond District of the State of Illinois, and keeper of the Rec	
STATE OF ILLINO SECOND DISTRICT.		

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 2.6 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gan. No. 6168

Edward B. Kreis, appellant

vs Appeal from Rock Island.

The County of Rock Island. et al

aj silees.

Dibell, P. J.

Edward P. Kreiz, a citizen, real estate owner and tax payer of the city of Rock Island, filed a bill in equity against the County of Rock Island, its supervisors and its jail building committee, to enjoin the county from building a new jail on the west side of the public square, and gave notice to defendants of an application for a temporary injunction. Defendants appeared and filed affidavits denying many of the allegations of the bill. Complainant moved for a rule on defendants to plead, andwer or demur before the motion for an injunction was heard, and also moved to strike the affidavits filed by defendants from the files. Each motion was denied; the court heard the motion for an injunction uson the bill and affidavits and denied the motion and dismissed the bill. The affidavits and exhibits thereto were preserved by a certificate of evidence. Complainant appeals lron hat learee.

Dunne, Catholic Bishop, vs The County of Rock Island, in which the supreme court filed an opinion on April 20, 1916 was a similar bill for the same relief, and the record in this case shows that the motion for an injunction in the Dunne case was set for the same day as the motion in this case. In that case the court denied motions to compel the defendants to plead and to strike affidavite filed by the defendants from the files, and dismissed the bill. In that case the affidavits were contradictory to the bill, and it

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PARTY OF LABOR. S. GARREST.

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Angual From Rook laight.

The County of Rock Island. of wi

Libell, T. J.

Thrank E. Mrede, a diviser, con lest te charle ten jayer of the city of Book leighaf file; a bill in country agninat the County of Rook Island, the succession is sejuil builling committee, to anjoin the county from suilling flat new juil on the west side of the public square, and notice were notice to definidants of an argination for a tearproper injunction. Defendants upperment sided collissivity auritanians ay of the chlequations of the bill. Complainant moved or a rule on isdendante to plead, ender or sear before the motion for an injunction was beard, and also roved to etrilia the affidavita filed by defendents from the files. Ereh motion was isnied; the court beard the motion for an injuration ucon the bill and affine the ani denied the ection and hismiseed the bill. The efficavity and exhibite therewe were property by a scrifficate of svidence "Occalainer - salas-PRODUCT OF SHIPLE

in which the supreme court filed on epinion on April 10, 1016
was a cimism bill for the westen for an April 10, 1016
this ones shows that the motion few aminjunction in the
Dunn: case was not few the same day a fit setten in this
shae. In that ones the court denied actions to this
leftenishts to pleaf and to chima affinishing in this by
defendants from the files, at dismisselves the life of

was held that they could not be received for that purpose till the bill had been answered. For the reasons stated by the supreme court in that opinion the court below erred in this case in refusing to rule the defendants to plead and in refusing to strike from the files the affidavits filed by defendants. It was therefore held that upon the denial of the injunction, the court should not dismiss such a bill before any pleading by defendants, unless it appeared from the bill that it could not be so amended as to state a case in equity. In this case, Isaving out of consideration all other allegations of the bill upon which the prayer for relief is based, this bill charged that the County of Rock Island was indebted beyond the constitutional limit and that the cost of the new jail and other matters intended to be built in connection there ith would be so great that, even with the avails of the bond issue which the people had voted, still the indebtedness to be oreated by said work would be beyond the constitutional authority of the County to create. These allegations, if true, would justify the relief. It may be tisy are too general and should set out the amount of the County's indebtsdness, the sesessed value of its taxable property, and should show in greater detail that the building of the new jail would involve the County in an unconstitutional debt; but if it was too general, it could be amended, and the allegations were sufficient in that respect unless questioned by demurrer. It was therefore error to dismiss the bill. The decree is therefore reversed and the cause is remanded.

Reversed and ramanded.

held that they sould not be received for then ourross till 'as bill had been accorated. For the rescond states by al serve soled fouce out aciaigo font at funce asserbe out this case in refusing to rule the delicaters to these and in relugion to strike from the files the of iferite file, by is fainer at a monu fant blod professor on a fintenestal the injunction, the court should not dishits out a this bolfore any plending by asimpleably, unless it conserved inca the bill that it could not be so wanded as it shift alie and case in equity. In this case, leaving out or son ideration regard ent doller mogu file office and the present for ralies is because the other paid the County of dimil Lanchiviliance and Lingar batasini and basis NaoR Sehnotat amoide, modto ban Ebnj wen out to door out their inc tast ther we ad blue, at benefit metroennos at flind e. of even with the grails of the bond tasus thich the propin had woted, still the ladebtechess to be associated this abstor st ythus) wit lo ydirentun Lastititist constit in the County to oreate. These wiscontions, is true, would justify the velici. It may be that see too jearent and should est out win a cunt of the County's intebactress, the assenced value of the remain property, and chould that the presenter sated that the sailuing er the ser tail rould involve the Coursy in an onconstitution I Libbs; but if it was too remempl, it sould be thinked, and it slisgations were auddiction that that reproduce guarations . Ality sait assauct of worms enclosed took of a renumed yo .iu... o ni gumno onf can baumoven emnkesoff of semost off

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STATE OF ILLINOIS, second district. ss. I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 2 6 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6210.

George J. Burkheimer,

Deft. in error.

VB

Error to Peoria.

C. R. I. & P. Ry. Co.

Pltf in error.

Carnes, J.

George J. Burkhaimer, plaintiff below (defendant in error here) was, on November 23, 1911, acting as a motorman for the Paoria Railway Company, and after ten o'clock at night while he was running one of its cars over a crossing at grade of the Chicago, Rock Island & Pacific Railway Company defendant below (plaintiff in error here) an engine of the defendant running at a high rate of speed and in violation of a city ordinance, collided with the plaintiff's car in flicting on him serious bodily injury, for which he brought this action, and after successive trials had verdict and judgment for \$2000 from which judgment this writ of error is prosecuted. The verdict is small considering the seriousmess of the injury. There was no question that the defendant was guilty of negligence in running its trains in violation of the city ordinance which limited the speed to six miles per hour. The evidence fairly shows that it was running at a much higher rate of speed. It is not claimed that any error occurred in admitting or rejecting evidence, or giving or refusing instructions except in refusing to direct a verdict for the defendant. A reversal is sought here solely on the ground that the plaintiff was not in the exercise of due care for his own safety at and immediately prior to the time of the injury. It is admitted if he was in the exercise of care he can recover and said if he was not in the exercise of due care it makes no dif-

Gen. No. 6210.

Deft, in error.

Error to Peoris.

aV

C. E. I. & P. By. Co.

Plts in error.

Carnes, J.

George J. Burkheimer, picintiff bolow (defendent in error here) was, on Movember 23, 1911, acting as a motorgan for the Peoria Railway Company, and after ten c'olock at night while he was running one of its care over a crossing at grade of the Chicago, Rook Island & Pacific Railway Company defendant below (plaintiff in error here) as engine of the modificate ni bas beens to eter dain a ta gainaur tabbastoc of a city crainance, collided with the plaintiff's our in flicting on him serious bodily injury, for which he brought this action, and after successive trials had verdict and judgment for [8000 from which judgment this writ of error is prosecuted. The vertict is exall considering the seriousgees of the injury. There was no question that the doismiant was guilty of negligence in running its trains in violation of the city ordinance thich limited the speed to six miles per hour. Tas avidence Chirly shows that it was running at a much higher rate of speed. It is not claimed that any error occurred in admitting or rejecting evidence, or giving or refueing instructions execut in refusing to direct a verdict for the defendant. A revergal is sought here volely on the ground that the plaintiff was not in the exercise of ine erro ent to estoreme ent at ton immediately prior to the time of the injury. It is admitted if he was in the exercise of oare he can recover and evid

ference whether the defendant was guilty of negligence or not. We are asked by both parties not to remand the cause. The record does not show the number or result of preceding trials; but appellant apparently prefers that we affirm the judgment rather than reverse and remand the case for another trial. We have therefore examined the evidence with a view of determining whether the trial court would have been justified in directing a verdict for the defendant, and, if not, whether we are warranted in reversing the case with a finding of fact that the plaintiff was guilty of contributory negligence.

The plaintiff had worked for the Paoria Railway Company as motorman for about three weeks and had no previous street car experience. His instructions from his employer, which he understood and before the time of the accident obeyed, were to bring his car to a stop before crossing the defendant's road and wait for his conductor to proceed on to the larendant's track and dignol him to mand areas. Him theory of the case is that he was intending to stop his car at the time in question but that it was dark and snowing and he was relying on an electric light that the defendant maintained over the crossing to guide him as to the place to stop; that at the time the light was not burning and ha, misled thereby, drove on to the crossing without knowing where he was. The evidence is conflicting on the queation whether it was encoing, and I' dirac, an Italy to whom that there were other means from thich the plaintiff might have known that he was approaching the track. From a reading of the record we are inclined to the opinion that ordinary prudence would have guarded the plaintiff assess against the accident and injury. But it was a question for the jury,

Paramos whether the defendant was quilty of negligence or not. We are asked by both porties not to remand the emess. The record does not show the musear or result of preceding trials; but apparently prefers that we affire the judgment rather than reverse and remand the case for another trial. We have therefore summind the case for another trial. We have therefore summined the crist court ownly with a view of determining the that the trial court ownly need been justified in directing a vardist for the defendant, and, if not, whether we are warranted in reversion the that and the circuit of restants of the circuit of the court of the circuit of the court of the circuit of the court of th

The plaintiff had worked for the Partie Rullery Conpany sa motorman for obout three motio and had no previous allowed our employees to the property of the party of the party of CHARLES OF THE PART OF THE PART OF TOTAL OR TOTAL OR TOTAL OR THE PART OF THE obeyed, were to bring his dar to a stop before crossing the TO SITE OF U. STOCKED BY SIZE OF THE AND BROWN A PROMINED AND naM . - which is the second of the second of theory of the case is that he was intending to fo stop his rearrant been dead sew it finds that moisseup at eacht saft is the and we was relying on an electric light that the delication maintained over the prosesing to puise big as to the place to atop; that at the time the light one nor housing on it is misled thereby, drove on to the eression of thest impoing where he was. The evidence in confliction of the govertion whether it was enowing, and it shows, of reall to firm ide in Thirriade and reinb werk emper resite susw smest is it have known that he was spercocolder the treek. The of wine, tent noights out of Santleni one on brober out lo prudence would have justich sign sit labrauj even bluow eoneburg the state of the s

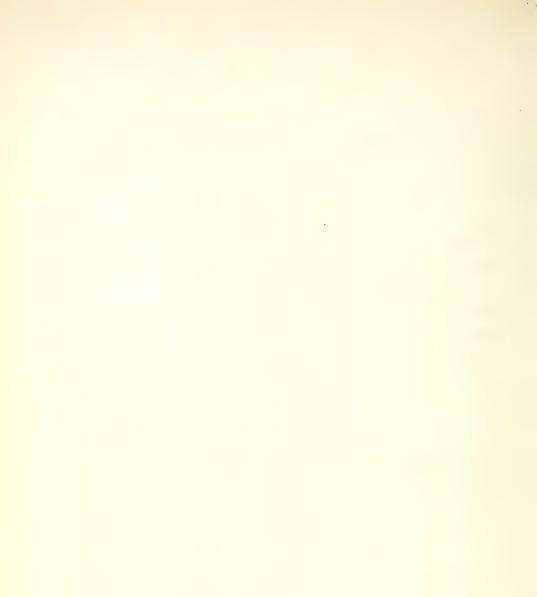
and the trial court could not have directed a verdict without weighing conflicting evidence, which he is not permitted to do. And while we are not satisfied with the verdict, and were this the first trial might regard it our duty to reverse and remand the case on the ground that in our opinion the verdict is against the weight of the evidence on the question of the plaintiff's ware, zetil we do not regard the evidence so clear and satisfactory on that point as to warrant us in letermining the lesucs here by reversing the judgment without remanding the case. Plaintiff's duty to stop his car before reaching the crossing was one that he owed to his employer and not, so far as this record shows, to the blancat. Thether he als in the exercise of ordinary care in authorn, guiding himself as to the place to stop and made a mistake that am aranaarily prudent man might make under the circumstances, is not free from doubt. There is room for a reasonable difference of opinion on that subject. Therefore the judgment is affirmed. Affirmed.

Niehaus, P. J. took no part.

. _ u weighing conflicting evidence, which he is not THE REPORT OF THE PARTY OF THE rue of broner topin feitt totte oll old egen fue , foilerev o y to reverse and remand the dese on the ground that in our opinion the verdict is against this weight of the eviloned as to have many one of this council in college on the I THE RESIDENCE OF CONTRACTOR OF SECURITY AND ADDRESS OF THE yd eggn seugat tai gmiminiadet mi tu daegaan of ta thiog would name to publish their of their their art as become WHITE DAY OF STREET, BOTH BOTH BOTH OF THE RESERVE propriet and the register of the factor to bell address. the man while a manufacture in any man all lastring nation, **grada**tion of an organization to as -nicto ha fund salataim a phan bon gota of apalg out of the cally cruised can wight cake under the circumstances, is not someraltil eldencement a tol moor at exact . stouch mark eart . inica on that subject. Therefore the judgment is ullimed. .beamitlA

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, no hereby certify that the foregoing is a true copy of the opinion of the
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day ofin the year of our Lord one
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Cierk of the Appetitie Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

APR 2 6 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

grand the state of the state of

Gan . No. 6171

C. V. O'Connor, appellee

VB

Appeal from Boone.

P. R. Kennedy, appellant.

Nichaus, J.

This is a suit brought in the circuit court of Boone
County by the appellee, C. V. O'Connor, a merchant doing
business in Belvidere, against the appellant, P. R. Kennedy
who was the owner of a farm near Belvidere, to recover commissions for services which the appellee claims he rendered
under an agreement with appellant to procure a purchaser
for appellant's farm, and for services rendered in connection
with the sale of the farm to Theodore Schwebks, the purchaser.

The declaration contains the common counts, and a special count alleging, that appellant agreed with appellae, to pay him a usual and customary commission of two per cent on the salegrice of appellant's farm, for procuring a purchaser for the farm and that appellae did procure such purchaser, namely Theodore Schwebke, who bought the farm for \$33,000.

It appears from the evidence that the appellant, who is now a resident of Los Angeles, California, previously resided in Boone County; he owned the famm in question, consisting of about 317 acres, which was situated in the Township of Belvidere; that prior to his removal to California he tried to sell this farm; and so in March 1913, offered it to Theodore Schwebks; but Schwebks said, he was not so situated as to be able to buy the farm, at that time. Afterwards in the month of July, of the same year, Schwebke went to the clothing store of the appellee, and inquired if he knew where appellant was then living; that he wanted to ascertain the price for which the farm could be purchased.

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C. V. O'Conmor, states

ve Appeal from Rooms.

P. R. Kennedy, appellant.

"L concod" J.

This is a suit brought in the circuit court of Boone County by the appellee, C. V. O'Connor, a merchant doing business in Belvidere, against the appellant, P. R. Kennedy who was the owner of a farm near Belvidere, to recover commissions for services which the appellee claims he rendered under an agreement with appellant to procure a purchaser for appellant's farm, and for services rendered in connection with the sale of the farm to Theodore Schwebie, the purchaser.

The declaration contains the common counts, and a special count alleging, that appellant agreed with appellee, to pay him a usual and customary commission of two per cent on the salerrice of appellant's farm, for procuring a purchaser for the farm and that appellee did procure such purchaser, numely Theodore Schwebke, who bought the farm for \$53,000.

It appears from the evidence that the a pellant, whe is now a resident of Los Angeles, California, previously resided in Poone County; he owned the farm in question, consisting of about 317 acres, which was situated in the Township of Pelviders; that prior to his removal to California he tried to sell this farm; and so in Moroh 1813, offered it to Theodore Schwebke; but Schwebke anid, he was not so situated as to be able to buy the farm, at that time. Afterwards in the month of July, of the same year, Schwebke went to the clothing store of the same year, Schwebke if he knew where appellant was then living; that he wanted to sacertain the price for which the farm could be purchased.

The appellee thereupon volunteered to write to appellant to obtain the desired information, and did so. He wrote, inquiring what was the lowest price at which appellant would sell his farm; at the same time informing him, that he had a purchaser for the farm, but did not disclose the name of the purchaser.

Appellant answered appelless letter, saying that he would sell the farm for \$140 per acre; and added a postscript which was to the effect that he would pay appelles a commission, in case he succeeded in making a sale of the farm to the purchaser in question. Afterwards, Schwebke came to appelless store, before he had received appellant's answer to the letter, and inquired whether appelles had heard from appellant concerning the price of the farm; and appelles told Schwebke, that he had not then heard; but that as quick as he had heard, he would let kim know. Afterwards, Schwebke came in again, and appellos then informed him that the price of the farm, according to the letter he had received from appellant, was \$140 an acre; and Schwebke said, that was all he wanted to know.

Nothing further was done, with reference to the matter, until the month of September following, when appellant came to Belvidere on a visit, and went to see appelles. Appelles then informed him, that the purchaser he had in view was Schwebke. Thereupon appellant and appelles together went to see Schwebke, at his home; and appellant talked with Schwebke about 'he sale of the farm to him; and the next day, hired an automobile, and took Schwebke out to the place to look it over. Schwebke was willing to purchase the farm, but wanted to turn in on the purchase price, a \$20,000 mortgage which he held; and appellant would not accept this mortgage as a part of the purchase price, unless Schwebke would agree

The appelles thereupon volunteered to write to appellent to obtain the desired information, and its so. He wrote, inquiring what was the lowest prior at which oppolisms would sell his farm; at the same time informing him, that he had a purchaser for the farm, but did not disclose the name of the purchaser.

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to give him a discount of \$1,000. The parties lisagreed about this matter, and negotiations were ended, and the deal declared off, about September 9th. 1913. Appellant and Schwebke do not appear to have had any further negotiations until the final negotiations, about the middle of the following October; and those negotiations resulted in the sale of the farm to Schwebke.

It is claimed by appelles, that notwithstanding the breaking off of the negotiations in September, he kept on in his efforts to induce Schwebke to purchase the famm; that after the first negotiations had been broken off, Schwebke declared, that he would have nothing further to do with appellant, concerning the purchase of the farm, because appellant had not treated him properly in the matter; but that a pelles, by repeated efforts, finally induced him, to again consider the purchase.

After the negotiations had been broken off, appellant leased the farm to a tenant and made several improvements on the farm. He built new fences, and a barn, on the place, at an expense of about [1500. Appelles claims, that while these im rovements were in progress, he a ain spoke to appellant, in his store, about the sale of the farm; and again broached the subject of its purchase by Schwebkse. Hs also claims that he told appellant, he could not see why appellant was ignoring him in "the farm deal;" that appellant was offering other agents two per cent for selling the farm, and none of them were able to get a buyer; that he, appellee could sell the farm to Schwebke, if anybody in Boone County could; and that a sellant answered, by romising a pellec that if he got Schwebke to buy the farm, he sould live him the same commission he would pay anybody else; and that a pellants also stated, he would sell the farm to Schwebke

to give him a discount of \$1,000. The parties disagreed about this matter, and negotiations were ended, and the deal declared off, about September Sth. 1913. Appellant and Schwebke do not appear to have had any further negotiations until the final negotiations, about the middle of the following October; and those negotiations resulted in the eals of the farm to Schwebke.

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if Schwebke would pay for the improvements he had made, in addition to the price he wanted, per acre, which was either \$140 or \$150. Appellee claims, that he then took up the matter with Schwebke, upon the new terms, and Schwebke finally said, he would again consider the purchase of the farm; and that thereupon, appellee informed appellant, that Schwebke was ready to buy the farm, if he would see him; and that appellant replied, that he could not see him that day, but would in a day or two; and afterwards, within a day or two, that appellant did see Schwebke, and entered into the negotiations for the sale of the farm to him, which finally resulted in an agreement, and sale.

Appellant does not deny, that he had the conversation referred to, with appellee, at his store, concerning the terms upon which he would sell the farm; but denies, that he promised to pay appellee a commission, at that time. There is other evidence in the case, aside from the testimony of the parties in interest, some of which tends to corroborate and some of which tends to contradict the testimony which they gave respectively concerning the matters in controversy. A jury trial resulted in a verdict for appellee; and finding the amount due him to be \$606; whereupon appellant made a motion for a new trial, which was overruled, and a judgment entered on the verdict; from which judgment this appeal is prosecuted. This is the second appeal in this case; the first appeal having resulted in reversal, and a remanding of the cause for another trial. (O'Connor v Kennedy, 186 Ill. App. 277).

It is insisted by appellant, that appelles had no right to recover commissions, because there is evidence to show, that the purchaser was not really procured by appellee; that the purchaser had first been spoken to about the matter endiate of the factor of the commence of the c

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had talked with him about the matter; and that appellent therefore was really the first one to interest the purchaser in the purchase of the farm, and therefore that a recovery cannot be had, under the allegations of the special count; that the first negotiations which were consequent on the promise of ampellant to pay appellee a commission, had been entirely broken off and ended; and that the second negotiations, in October 1913, were an entirely independent matter, in no way connected with the previous negotiations; and the sale which followed these negotiations, was in no way connected with any efforts of appellee; that the evidence does not sustain a recovery under the special count; and that appellee, therefore, has no right to recover at all.

We are of opinion, that if, after the first negotiations concerning the purchase of this farm by Schwebke, had been declared off, appellant agreed to pay to appelles, a commission as testified to by him; and that upon the basis of this later agreement, appelled rais efforts to induce Sonvebke to purchase the farm, which efforts had theneffect of bringing Schwebke and appellant to an understanding and agreement concerning the sale, a recovery can be austained under the Downon counts. (Peter Boxberger v Edward Scott, 38 Ill. 477.) As to whether appellant did agree to pay commissions to appellee, as stated; and thether or not appellee hid actually make the efforts which he testified to; and whether such offorts were instruental in bringing about the purchase of the farm by Schwebke, were questions of fact to be letermined by the jury. There is sufficient evidence in the record to justify a jury in finding for appellee upon these questions; and this Court, is herefore not in position to say, that the finding was not in accordance with the evidence

of the sele, by the about the matter; and that appelled had talked with him about the matter; and that appellant therefore was really the first one to interest the purchaser in the purchase of the farm, and therefore that a recovery cannot be had, under the allegations of the sectal count; that the first negotiations which were consequent on the promise of appellant to pay appelles a commission, had been entirely broken off and ended; and that the second negotiations, in October 1818, here an entirely independent safter, at no way connected with the previous negotiations; and the sale which followed these negotiations, was in no way comeated with any efforts of appelles; that the evidence nected with any efforts of appelles; that the evidence does not sustain a recovery under the special count; and that appelles, therefore, has no right to recover at all.

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especially since two juries found for appellee on practically the same evidence.

Appellant complains, that the trial court erred in refusing to permit him to cross examine appellee as to the details of his knowledge of the farm in question; as to how many acres there were on one side of the railway; and how many acres there were on a certain side of the highway &c. Inasmuch as appellee had not testified, that he had any special knowledge of the farm, or its situation; and inasmuch as Schwebke appears to have been perfectly familiar with the land, it is not apparent why a detailed knowledge of the land by appellee, was necessary to bring about a sale to Schwebke. We are of opinion that the Court did not err in refusing to permit any extended cross examination concerning these matters which had not been the subject of an examination in chief, and which do not appear to be material, in the determination of the important question of the controversy.

Appellant also complains of the refusal of several instructions requested by him. The instructions which were refused, made it assential for recovery by appellee, that the purchaser was originally procured by appellee. In view of the fact, that there is evidence to the effect that after the first begotiations were declared off, appellant told appellee he would pay him commissions, if he would bring about the purchase of the farm by Schwebke, these instructions contained an element which might have mieled the jury; they might have inefrred that appellee was not entitled to recover, even though they believed that the second offer to pay commissions was made, if the purchaser was one whom appellant had originallt talked to, concerning the purchase of the land.

specially since two juries found for appoiles on prectically the same evidence.

Appellant domplains, that the trial court erred in Li of as sailages onimene agoto of mid fimted of mais as ailsof his knowledge, or the form in question; as to in many dores there were on one side of the reilway; and is a many sores there were on a certain mile of the bightey to. in a ten as appelled had not teatified, that he had only Crossini Amoviete at the carm, or its situation; and incommend as Schwebke appears to have been particulty familiar with the land, it is not apparent why a detailed knowledge elibe land by appellee, was necessary to bring about a onle to Schwebke. We are of opinion that the Court did not err in fusing to permit any entended order caudination occorring -miners as is tosidus ent meed for ban folder eretine e sition in obligi, on which is not expect to be extended, in the determination of the depresent question and and and 1.701.11

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The instructions were therefore properly refused.

Appellant also makes objection on account of the misspelling of the word "effect" in an instruction the letter "a" being substituted for the letter "e" in the word. We are of opinion that the jury could not have been misled by this slight error in spelling; and that they undoubtedly gathered the significance of the point presented in the instruction, notwithstanding the error.

Objection is also made by appellant, because several instructions for appelles, told the jury that the appelles "is entitled to recover, if he was instrumental in bringing the buyer and seller together"; and insists, that this authorized the jury to find for appelles, from the mere fact of a physical bringing together of the parties mentioned. This was not the purpose or reaning of the instruction; and we have no reason to think that the jury inferred a different meaning from that usually inferred from the use of language of the kind in connection with similar matters; namely, bringing the parties together, to an understanding, upon a matter of purchase and sale; and this was the question involved in the case, the only kind of bringing together that there was any contest about in the case. Instructions containing similar language, in controversies of this nature, have been repeatedly sustained by the Courts of Review in this State. (Henry v Stewart, 85 Ill. App. 170; affirmed in 186 Ill. 448; Haffner v Herron, 60 Ill. App. 593; affirmed in 165 Ill. 242.)

Other objections were made by appellant, to instructions on the ground that facts necessary to a recovery are assumed in them; and that some of them assume that appellee is entitled to recover a commission; and that some of them are erroneous and argumentative because of the repetition of the magnificant

The instructions were therefore properly refused.

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expression "instrumental in bringing the Jefendent and buyer together in different instructions. After a careful consideration of the objections made, we are of opinion that there is no reversible error in the instructions; and that taken together, stated the law with substantial correctness; and the jury could not have been misled by the language used in them, in the way indicated by appellant.

There being no reversible error in the record, the judgment should be affirmed.

Affirmed.

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STATE OF ILLINOIS, second district. ss. I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine bundred and
Clerk of the Appellate Court.
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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Present -- The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRÎSTOPHER C. DUFFY, Clerk 200 T. A. 250

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 9 1916
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6339.

The People of the State of Illinois.

Defendant in error.

VB

-- Error to Co. Ct. McHenry

Edward L. Herrick,

Plaintiff in error.

Per Curian;

ros, Farard L. Herrick, was, on a trial by the court without a jury, found guilty and fined under an information filed by the states attornsy in the county court anuended of McHenry County September 34, 1915. The information as & charged, that on to-wit: the Sath. day of May 1914, at and within sail county, Edward L. Herrick, the production in series "wilfully, maliciously and without reasonable cause, did abandon in destitute and necessitous circumstances" his wife, Teresa Herrick, "and did then and there neglect and refuse to maintain and provide for her". This was a penal offense under the Wife Abandonment act of 1903 - (J. & A. Stats. par. 3431.) The page 470) passed an act providing "That every person who shall without any reasonable cause, neglect or refuse to provide for the support or maintenance of his wife, said wife being in destitute or in necessitous circumstances, " shall be punished, etc. omitting the offense of adandonment theretofore existing. This act was in force when the present information was filed. It expressly repeal all other acts or parts of acts in con-The states attorney in his brief filed hore says that the offense was charged and the case tried under the act of 1915; that the offense under that act consists of nsglecting or refusing, without any reasonable cause, to provide for the support or maintenance of the wife in destitute or necisaitous sirsumstances; that the charge of abandonment in

Gon. No. 6329.

The Paople of the State of Illinois.

Defendant in error.

First to Co. Ci. Mollenry

Piert le derich

Pisintiff in error.

fairt a no .een . MoirreH . J brank . tot by the court without a jury, found guilty and Cinal under an information filled by the states attorney in the county court of Mohanny County Enghances by 1918. The 1 countries on charged, that on to-wit: the Sath. day of May 1914, at and within soil county, Edward L. Herrick, the pri wilfully, maliatonaly and without resconding sause, its chandon in destitute and necessitous circumstances" his : ife, Terana Herrick, "and did then and there neglect and refuse to relatin and provide for hor". This was a pench offence under the "iff Abandoneent act of 1803 - (J. & A. State. per. 3451.) The Cal. March Sal. Sale, 1916, F F 3433(1) at age, without any reasonable cause, neglect or reques to orcitie for the support or maintenance of his wife, said wife being in destitute or in mecessitous circumstances, " simil be punished, etc. omitting the offense of almadonment theretefore emigting. This set was in force when the present information we filled. -nge ni lies to airun ne sina asita lin lasqur ylassrons #I flict therewith. The states ettorning in his brief (1186 eays that the offense was charged and the cosm thich upler the act of 1915; that the offense under that not constate of neglacting or refuging, without any reasonable onuse, to royida

for the support or maintenance of the wife in destitute as

only the offense of neglect or refusal to provide. The conviction cannot be sustained even if that view is correct. The issue tried was not raised by a pleasef "Not guilty", but under a pleas of the defendant "That he is not guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and necessitous circumstances Teresa Herrick in manner and form as charged in the said information, as amended." The finding of the court was that "The said defendant, Edward L. Herrick, is guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and necessitous circumstances Teresa. 'Herrick, in manner and form as charged in said information." There was no issue formed and no finding on the charge of neglect or refusal to provide for the support of his wife.

The evidence seem to show that the defendant was a resident of the State of Wisconsin at the time the information was filed, and at the time the act of 1915 came in force. Whether under such circumstances, a husband failing to support his wife living in Illinois is guilty under the present statute of committing the offense in the county where the wife resides is a question not much argued. We are inclined to the opinion that he cannot be so held. We express no opinion on the facts disclosed by the testimony in the record before us. The judgment is reversed and the cause remanded.

Reversed and remanded.

the infer the constance of the contest. The correct. The correct. The correct. The floor cannot be sustained even if thet view is correct. The first of the defendant "That he is not quilty of wilfully."

and becomestions of the without reasonable cause abendoning in destitute and becomestions of the first in assumer and form and becomestion, as amended." The finding of a cut of the contest of the course searched in manner and form as charged in said information."

There was no issue form as charged in said information."

There was no issue formed and no finding on the charge of negalors or refusal to provide for the support of his wife.

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Reversed and remanded.

TATE OF ILLINOI SECOND DISTRICT.		R C. DUFFY, Clerk of	
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	BY CERTIFY that the foregoi		opinion of the
and Appenate Court in t	ne above entitled cause, of r In Testimony Whereof,		d and affix the
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	day of		
	thousand nine hundred		
		Clerk of the App	pellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk 200 I.A. 430

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

MAY 9 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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A West

Gen. No. 6282.

George W. Clendenin, appellee

Appeal from Whiteside.

Adams Express Company, appellant.

Per Curiam:

fortant motion in a fac bill. That rotion was denied an AThe motion to quash and the proofs for and against said motion was not preserved by a bill of exceptions. The record proper dies not liselose what particular item of the fee bill was assailed. The clerk has copied into the record a stipulation of counsel setting up certain alleged facts. stipulation does not preserve any thing for our consideration The trial judge is entitled to certify to us what motion he heard and what proofs he heard. If this stipulation had been embodied in a bill of exceptions signed by the trial judge then the questions argued would be presented but we have no authorized way of knowing upon this record what was presented or what proofs he heard. The presumption therefore prevails that the court acted correctly in refusing to quash the fee bill. The judgment is affirmed.

Affirmed.

George W. Clendenin, appellas

Appenl from Whiteside.

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record proper so not itseless what posticular item of the record proper satisfied. The clerk to copied into the record fee bill was assailed. The clerk to copied into the record a stipulation of sounced setting up certain allaged facts. The stipulation does not preserve any thing for our sensitive the trial judge in anti-red to certify to se short motion to heart and what proofs he heard. If this stipulation had been smoothed in a bill of exceptions signed by the trial judge authorized way of knowing upon this record what was presented or what proofs he heard. The presumption therefore prevails that the court acted correctly in refusing to quash the tre

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one thousand nine hundred and
thousand fine bundred and
Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk. O O T A 441

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 1 0 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Hicheus, J.

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probate and two in full force and office; with a size of the that of the pine of her I wife. Preud D. Michel War in sect a let of Noney and ecoets of her ecoets to the to the contract of a . 2004; that he this paned as encentor in the will continued, but I as une he was a non-reifent could test act as small; that show hy salar Tie doubth of War io thite, Frin F. Tracker reg ested And a to just the B. White 31,000 out of the es are of Agante Chite than in the Carles, with the understanding that the count due on the policy chould be collected by Adoms and the 11,000 to be gold in them B. Wite should be coducted from the execut due on the politor when collected by Adams; and the decree further linds that thus three in upliture to pay hite raid (1,000 and then the could be faile 1. Theoler oftempted to republiate her armsered in the Adams that the .1.000 cheald be coducted from the amount of the solicy when colleged by done; and further finds, that the readers, by collusion because Falm . Mhoolov and hor imaband, on Arthur P. hibe, our car Wilkin Crann, careerated in the joil of Climbon, Is a,; that the arrest of Adams was the a for the entrope of compelling him to go the libb. and Talu I. Wheeler, money beloning to the estable of vir lastweet, thich idams then had, and this while idems were so under wheet he was compolled, by damess and throads of imprison tell, so gay naid Thibe soid (1,000, trich said bairs to Theolog in Coegnor be Address to pay to implant it. Initia, and the Indian the policed by seed menus to pay to read Salm II. he show a 964, seek successful. sump were poid by rei " Asmo only of the release of the bull of

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The decree further finds that hula . Theoler and leave and Arthur B. White all understood at the time hala Wilhester requested ideas to by said 1,000 to said Arthur . hite that the anomat of said policy should be callected by the legal ne-presentatives of said estate and the said (1,000 should be conducted from the anomat due on said solley.

The decree also finds that Waln II. heeler and Athar D. have are estopped by their co duet, as aforesaid, from disputing the right of the legal representatives of sem estate to collect the amount Tue on the policy in question, and by this equity and good conscience the amount fue enthe velicy should be so dested by the administrator of the estates; and the feeres finds to at the Forbes, administrator of the estate, should in equity and wood conscience be allowed to collect the amount due on the policy and should have the right to an equitable lies on discretizes said amount so collected for the numbers of reinbursing the entate for said arm of [1,000 paid by laams to white under empose, and was the further sum of .264. paid by 'dams out of the denote of the said os a o through the exercise of duress and threats, and the circ balance of the fund should be distributed by the frinistrator under the terms of the will; and it was ordered in the decree that the administrator be given a lien upon the amount in the honds of the clerifier the surpose of reimburging the estate for the cl. 000 paid to Arthur B. White by foams and for the 1864, would to Fulk H. theeler by Adens.

It is appaint that we decree attemps to adjusticate upon matters which were not in issue, and in no way connected with question axising when we intempleater, and adjustic les

ిం కొంటా కుంటెలంలో ఎక్కారు. ఎక్కువ ఎక్కువ మహికే కారు అయ్యంతి అంటెల్ ట. Pract ఎక్కార్స్ ఉక్కువ అయ్య చేశం కు అయ్యాలంతాలు చేసిన అయ్యాన్ని ఎక్కువుడ్నికున్నికి ఎక్కువక్కారు. కారుకోవ కుక్కువ అయి తెల్లెమ్ కొయ్యాన్నారు. కారు ఇంటానాన్ని స్తల

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Trank IL Mans, who was in all as emember of Sin I is will of the insured. Missie White, nower became the legal newseaststive of the embate, and never had qualified, or at empired to quality, as a certar. The to name thous between him and Artaur B. Mito and bulk ... Machar concorning the accors of the arete and the separat to wither 1. White and Lulu II - Wheeles of alkered Fromi: I. libra was a witness in the ecoe, and toosidied 🕇 that there nover three any appets of the estate of fit the filter in his from this is on the birde transport and is in a call abrum denoted to him all the as ots of her estate before her double, and that she left none except the larmone's policy. ? Incorrect as he was not the logal representative of the estate, and the not at any time handle only of the ascets of the estate, who tower amongo loub he not have alle with either of the carbins indel comeanim; the payment of coney to then, or either ou than, were questy a pousonal matter in which who estate was not hereally concerned, and All contain parties were wishing convertible to the up meany his monean was a person I one, and not one Trut would pass to the . I delicatedtor of on estate. In any whom of the engate a combinational We a are alleged to have a misen proper that artica at alimber,

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If the educate the a legal claim upon the process of the first instrument policy or any lion thereon it is not seemed at the instrument of the passes of the oney paid by French L. Idems with the limit to the action of the policy of the constraint of the proceeds of this policy is to claim and the traffic them to be adjudicated in a multiple character of the policy is to claim to the way not a garry; nor could make playing be transferred the way not a garry; nor could make playing be transferred the adjudication to the limit.

The only weal motion in miles were sublished to the prowhother the child on of Pinnie This were sublished to the procoods of the policy under the newtra sert. If the assignment
as valid as been a locally of action, than the proceeds of the
policy rightfully belong to show; if the configurate was not
valid, then he of initions for world to entitled to even proceeds.
In this shows on the case in prior, and the therefore, no
other greation could account to this entitle that. (There a sameon, i.
C. Co. III III. 199. 270; Types 7 (prior, 251 III. USV)

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The requirement that an essignment should be artished to the relief was one make by the insurance company, and digit form the basic of an objection by the insurance ampony; but increase as no objection we reason to the semi amount by the increase commany, the legal we recombite of the assessment in most in position to effectively question the validity of the archground on that account. (Green vinitual Fide Inc. e., 98 Inc. to p.307; Johnson, et al., v Von Eppe, 110 Inl. 551; Hartin v Stability.

186 Inl. 587; Aid Acclety v & wis, 9 Lo. App. 410; Asidt v
R.S. & P.C. Ben. Arso. 96 Inl. 500)

Voluntary softlement of the process of the policy in the Pight of a voluntary softlement of the process by the in mod upon that minor children, a name if following of the policy was not necesserizely a question of the interview of the profiley was not necess. It postionian form or constant to the question of the interview of the provider of delivery. It may be by to the without bounds, or by words whiteen the other; or by both. Inviting that electric confictions as interview to the posts with the property hardfred constitution a sufficient to-livery. Hence the very essence of following to be interview to the posity. (Organ to all views, Distinct 50.)

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question arose upon the validity of a deed upon No modern at sec delivery, and where the granter had sent the feed to the results and had no the results are the feed to the results, and where the granter's death; it was held that if the granter, with or without any provious ar announts with the granter, had signed, scaled and colmowledged a deed, placed it in No hards of the registrar to be recorded, notified the granter of the hards of the results of the granter of the hards and her asented to receive it, by words only, this would be a most delivery, though the granter table before taking it into his neture that act and her asented to receive it, by words only, this would be a most delivery, though the granter table before taking it into this neturn personation because the a only of a presented and accombance.

In the case of minors or infants of the a voluntary settlement is made for their benefit, an acceptance is presented. The court cays in Pratector vs Chook, NS IN. VE in reference to the matter of delivery in the case of infants: "TIL TIL Cases excess cited on both cites one reconcileble on this conditionation—that the intention is, and care to, the converting element. In a case like this, where the conveyance we volunt as, and so an infant who died before he re ched an age to accept or anject the conveyance, a delivery and so openies will be take restainly ancestrated them in the cases to which recesses in as a bungalloute council. The principle being obtained the cases to the delivery as the character of the process of the conveyance of the principle being obtained the case the discussion to accept or reflare, and dring before that period abundance is be grantor having posteriod every not us could conform by page its title of the infant, and it being for his beneath, it is fair to procume he has accorded to its."

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The principle established in Two estat reference to come naing delivery and the resumptions principlin reference thereto
in estat of implement, here been reiterated by our superse court
in a number of estat. (Rivers v Mellow, 59 III. 415; Red v
Douthit, 60 III. 548; Union Mittel Int. Co. v Campbell, 95 III.
267; Weber v Christen, 121 III. 91; Williams v Milliams,
148 III. 426; Miller v Mears, 155 III. 284; Abbott v Abbott,
160 III. 4.6; Delter v Mell. 214 III. 554.)

question the two children of histo Lhite were living at hims with their rether, and that they were inferts of the cross of 11 ond 15 jears respectively. And the intention of the incured to transfer the proceeds of the policy to the while on is clear-Ly mention bet by the feet that also take the tenigment in the enf prover form and executive in in Explicate, and sont to the consum; one of the duplicated to sutingly the require case and by the company in that regard to process their assess to the estigneout to the children instead of to her estate. There was mothing further that also could have done to now officetively imiliante beneficiaries of the prospension the policy. A manual falivory of the policy who not wiseron are whealth, more than it neces buy unler the authorities cited; An receptance by the children must be locally a sunal it wester on assistant for their barrable. As a volumbery sobilerary upon the minor children, there were sufficient land Collivery to the the mainten to Limita; officet.

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But the assignment in question was in legal officer and as a matter of fact simply a change of beneficiary. This policy, which was taken out by the insured, and make yayeble to her enceutors, administrators and assigns, is in the ways legal category as if it had been made payable to herself, and she had the came power over it as if it had been originally payable to hersolf. (Johnson v Van Hops, 110 Ill. 551) In the case just cited the court says: " Who contract being between the insurer and the carty whose life is insured, so long as the latter retains possession of the policy he has the right, with the congent of the insurer, to change the contract of insurance so so to give the proceeds of the policy, muon his death, to a diff event beneficiary, or to change it in my other manner the contracting parties may a more upon not contrary to law or good words. That this position is supported by many analogies of the law us well as by empress adjualentions must be conceded. (Clarko v Durant, 18 Wis. 248; Morrom v Hotterd, 25 id. 108; Moster v Gile, 50 id. 605, and Gambs v Intual Life Ins. Co. 50 No. 44.)"

We are of the opinion, therefore, that the med edited of this assignment of the policy, which was accepted and acquiesced in by the incurrace company, was a charge of the bene-ficieny, and a delivery of the policy, for this purpose, it not necessary. It is not necessary in order of setting to mean a person a beneficiary in an immunue policy that the policy chould be delivered to such yearson; now is a delicery of the policy necessary to the beneficiary who is maintived in substituted in the place of the early final beneficiary.

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The fit become not set is about how been conceed what the process of the policy in the banks of the cloud of the chemical to court be policy in the ballic and fully. Theolog, each taking one half; and that the policies are claim upon the fund in question. The decree is therefore now read on the stand in question. The decree is therefore now read on the case remarks a with directions to enter a decree in reconfigure with the circumstant.

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STATE OF ILLINOIS, SECOND DISTRICT. SECOND DISTRICT. STATE OF ILLINOIS, STATE OF ILLINOIS
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk. 2 0

E. M. DAVIS, Sheriff.

AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

And the control of particular passes was a final and the control of the control o

CONTRACTOR STATE

Gen. No. 6195.

Payton J. Tuchy, appellant.

VS

Appeal from Till.

Chicago & Joliet Electric
Reilway Co. appellee.

Nichaus, J.

This is a suit brought by Payton J. Tuchy, an attorney at law, by petition, to satablish an attorney's lien under Fastion I of the art of the lacural Assembly, passed in 1909 occuting an attorney's lien; and to enforce the same, against the appelles, Chicago & Joliet Floctric Railway Co A The petition svert, that James 7. Winer, of the city of Jolist and County of Will, retained the petitioner to represent him, as personal representative of Harold Miner, deceased, in probating the estate of the Assessed; and also in as action for personal injuries resulting in the death of said Harold Miner such action to be brought against the Chicago & Joliet Electric Reilway Co. ; that the petitioner on or about the 38th. May of October 1912, entered into a contract with said Miner, whereby he was to receive for his services rendered in that behalf, a fee of one third of the amount recovered ugainst the Chicago & Jolist Electric Railway Co.; that in compliance with the terms of the aforesaid agreement, he attended the inquest even the body of the aforeasid Harold Miner, leccased, and examined all the witnesses before the coroner; that on or about the Blst. day of October 1913, he served upon the Chicago & Joliet Electric Railway Co. a notice of attornsy's lien; that thereafter Janes W. Minor and the Chicago & Joliet Railway Co. compromised the said claim, with James W. Hiner as administrator of the estate of Harold Miner, decessed, and that the sum of \$600 was puid

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Till is a fitt brought by Paytea J. Tucky, on stronger wearn male stylenoite or falls too of prolifety as an ended and of the wot of the General Assemble, or cost to 1808 ungelles, Chicago ! Joliet Flootpic Ruismay Ca 🖍 tion svere flut James W. Minor, of the entwice Johist dougty of Will, rateixed the patitioner to me, seems time, ... rioral regressitative of "light" "fast, hoosensi, in northe tie setete of the issenced; and give in an action for ranks aloued bile to diath this is guilluser seinlini tore to on action to be brought against the Concept & Jollet lectric Pullyay Co. ; that the predictions on or about the . n. luy of Ostober 1818, ontered into a contract with said Loweliner amounted aid too endeers of and advisors, or Lanaroces I more out to baid one or out a finded to the at the Ohiouro & Johiot Historia Hillmy Co.: Fort in rolliance with the terms of the attribute worse, rious thereof, are to gird out have teaupated tala the principal assertion of the wife assertion that oner; that on or about the Glass. the of Catcher 2011, erved won the Ohiosgo & Johiot Elligheid Failmer de. w witch of actornay's lion; that fourthing dues to late Unicomo & Joshek Rail by Co. mongregation to: -11 Let . I the set in the relation of the catalog of Birthia Cle . to know of tent fine of the court of the

to James W. Miner, as administrator, in full of all claims without the knowledge of the petitioner, and without any notice having been given petitioner.

The petition also avery, that the notice required by the Statute to be given, was served, and filed, in order to establish the lien; and was served and filed as required by law; and the petition prays, that James W. Miner, administrator of the estate of Harold Miner, deceased, and said Chicago & Joliet Railway Co. a corporation, be made parties defendant, and be required to make answer to the petition; and that the defendants may be decead to pay the petitioner such sum as he is entitled to, as fees for the services contracted for.

The notice which was served on the appellos, is as follows:"Notice of attorney's lien.

To the Chicago & Joliet Electric Railway Company, a corporation: You are hereby notified that 'he undersigned has been retained and employed as attorney at law by James W. Miner as his attorney, to ask, demand, receive, compromise and settle a certain suit, claim, demand and cause of action against you for personal injuries resulting in death to one Hartld Miner.

"You are further notified that in consideration of services reniered and to be rendered, we are to have and receive a sum equal to one third (1/3) of the amount recovered on account of such muit, claim, depend and cause of action; that we have and hereby claim a lien upon any verticet, judgment, decee, compromise or settlement entered or arrived at, and that under an act of the general assembly of the State of Illinois entitled "an act creating attorney's liens and for the enforcement thereof", in force July 1, 1909, you are to make no settlement of said claim, etc., without my consent and without satisfying my said claim for foes and services.

e James T. Miner, as caministrator, in full or all claims
out the knowledge of the potitioner, and without way
aving been given potitioner.

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The patition was acreed, and filed, in order the Statute to be given, was acreed, and filed, in order a establish the lien; and was served and filed as required eright the potition prayer that Jaces W. Winer, admir-tor of the estate of Marold Miner, Steemed, and eath to go & Jeliet Ballway Co. a corporation, he sade parties a dant, and be required to make access to the petition; that the Jefendants say he decord to pay the patitions.

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"You are further notified that depulsemention of administrative and to be rendered, so that the beautive and account of unit to one third (I/3) of the amount account of anit, obtain, depend on a cause of action; that the large of action that the large of action any vertical, judgment, somewhomiss or settlement entered or arrival at, and act of the general assembly of the I. see the initial and act or eating atterney's liend and the relation of the country of the I. see the large atterney's liend and the terms of the country atterney at the country of the country of

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"Dated at Chicago, Illinois, this Blat. day of October A.D. 1912. Exhibit "A". Payton J. Tuchy."

The notice was served by mailing the same to the appelles Railway Co. and was received by the company in the course of the mails. Upon a hearing of the petition, it was dismissed by the court for want of equity; and from the orien dismissing the petition, this appeal is taken.

It is also drown to end though the destroy of the recries a to be rendered by the potitioner, was made with James W. Miner in lividually; and not with him as adminisheator of the estate of Harold Miner. deceased; and that James W. Miner, who, subsequently to making the contract for the attorney's fees claimed, was appointed administrator of the estate of Harold Miner, lecsased, does not appear to have, as such alministrator, in any way recognized, ratified or adopted said contradt; and that so far as the estate is conserned, the matter was left in the same position as it would have been, if some other person had been appointed administrator. The claim of the petitioner, therefore, appears to be against James W. Miner individually; and the notice which he served uron the appellee is concerning a contract for services with J. W. Miner individually; and does not in any way state, that he has or expects to have a contract with him as administrator of the estate, not a claim against the estate for services.

It does not appear, that James W. Miner had any case or action or demand against the appelles, which was compromised or settled. And inasmuch as neither the contract, nor the notice, cover any compromise or settlement or lien for any attorney's fees, due from the administrator of the estate of Harold Miner, deceased; nor fir any action, claim or demand of said estate against the appelles, the legal basis the lien is not established.

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The evidence shows also, that the service of the notice in this case was by mail. A notice to establish a statutory lien, where the manner of service is not pointed out by the Statute, requires a personal service of such notice. (Haj v American Bottling Co. 261, Ill. 363.)

Appellant incists, that because the appellee admits in his answer, that petitioner served the notice in question, it is not in a position to raise the question of the validity of the service. We are of opinion, however, that the admission merely relates to the fact of a service of a notice; and does not admit, that such service was in compliance with the requirements of the Statute. It is clear, under the lecision in the Haj case supra, that a personal service on appellee of the notice, was necessary, as a condition precedent to the establishment of a lien, if the petitioner had one.

For the reasons stated, we are of opinion that the court did not err in dismissing the petition; and the decree should be affirmed.

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The casons stated, we are of opinion that the court is use this petition; and the secret should

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



616 3

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 1 0 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

The state of the s

e de la composition della comp

Gen. No. 6198

Louis Schildmiller, appellee

vs Appeal from Co. Ct. Rock Island.

Cigarmakers International
Union of America et al

appellants.

Nichaus, J.

This is an appeal by the Cigarmakers International Union of America, and the Cigarmakers International Union of America Local No. 201, from a judgment for \$550 rendered against them jointly, in favor of the appelles.

Louis Schillmiller, in the county sourt of Rock Island Gaunty. The suit was instituted to recover for a death benefit, which appelles claimed accrued to him, as a son of a deceased member of the appellant organizations.

It appears from the evidence that the father of the same of the that he had been such member for more than fifteen years prior to his leathm, which occurred on or about February 15, 1914; that under the constitution and by-laws of the organization named, it is provided, that upon the death of such a member, a death benefit of \$550 shall be paid to any person designated in writing by such member; or if he fails to designate a person in writing such death benefit shall be paid to his widow; and if there be no widow, then to his minor children; and if there be no widow nor minor children, then to any relative of the deceased member who, at the time of his death, is dependent for support, in whole or in part upon such deceased member.

It appears that the leceased did not designate any on-

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Louis Schildmilier, appelles

Appeal from Co. Ot. Rook Island.

Land Programme and the state of the state of

Inion of America et al

appoilantes

This is an opecal by the digernalized International

The state of the state of the control of the state of

America Local No. 201, from a judgment for (580

. onlered against them jointly, in dayor of the appeller,

Louis Collination, to the samely save at less to former

The suit was instituted to recover for a death brasit, . his.

elles claimed approprié bin, as a con of a deserge

smoor of the appellant or punishions.

It sopear from the evidence that the father of the Henry Schilimilier, was at the time of his death in ocd standing as a member of the International Union of America Logal No. 201; Land Chat a. of hoirs stary andfill mant erom rol rocmen down and . . his leathm, thich cocurred on or about February 15, 1814; that under the constitution and by-less of the or probability numed, it is provided, that upon the death of such a womber, a leath benefit of (850 s all be paid to may present talknated in writing by such araboar; as if he lotter to abtimute a person in writing such loath sensit; it is a read the bull . Low; und if there be no vidow, then to him thee chistern; yat of and, annihilate route non wold, on ed great li las with, is dependent for ou part, in declarate at , it wen . tedam Insuens Appn

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in writing as beneficiary; and that he left no widow, nor minor children; but did leave surviving him, his son, the plantiff, who claims, that he was partly dependent upon his father for support.

Two questions are raised on appeal, - first, that it affirmatively appears, from the evidence in the case, that there is no joint liability of the appellants; secondly, that the appelles was not in any way dependent upon his father, the deceased member. Upon the question of the joint liability it is urged by appellants, that there are two organizations, one national in character, and the other local; and that the National organization, and not the Local organizations, is But The evidence show that the local or anization is a part of the national organization; and under its control; that the local organization collected for, and had the custody of the benefit fund out of which death benefits were payable; and the national organization controlled the fund, of which the local organization had the custody; that the local organization was prohibited by the by-laws of the organization, rom paying leath benefits, except by the lirestion of the national organization. It is apparent, that payment of a death benefit is effected by the joint action of the two organizations; and that each had a constituent part to perform in order to effectuate payment. Under these circumstances the suit was properly brought against both jointly. (United Workmen etc. v Zuelke, 129 Ill. 298).

We are of opinion, uson the question of dependency, that the evidence tended to prove, that as a matter of fact, the appellee was partly dependent for support, upon the earnings of the deceased member. The deceased member was a widower, and living with the process, who as his only a partly tile.

in writing as beneficiary; and that he left no vidor, nor minor children; but did leave surviving him, his son, the plant, who claims, that he was partly dependent upon his

Two questions ar- raised on sageal, - first, that is uffirmatively appears, from the svilence in the case, that there is no joint liability of the appoilants; secondly, that the appellee was not in any say ispendent upon his father, the decessed namber. Upon the question of the joint liability it is urged by appellants, that there are two or anisations, one national in character, and the other local; and that the Mational organization, and not the Local organizations, is but lie evidence show that the local or entention limble. is a part of the national organization; and under its contro : that the local organization collected for, and had the area stilened Atask death to two Land filened the homesta ozyable; and the national organization controlled the fund; of which the local organization had the custody; that the local organization was prohibited by the by-large of the organization, from paying death benefits, except by the direstion of the autienal organization. It is apparent, that payment of a death benefit is effected by the joint action of the two organizations; and that such had a constituent part to perform in order to effectuate mayment. Under these sircumstances the suit was properly brought esainst both jointly. (United Workmen etc. v Zuelks, 159 111. 393).

We are of opinion, ugon 'he question of assendency, sand the evidence tended to prove, that he manders of last, the appellee was partly dependent for support, upon 'he sarnings of the deceased asmber. The deceased and read a salders,

living with his son, and for at least two years prior to
his death, he had serked for the Rock Island Sanguage Railread
Company, so I grain earning \$30 per month, for nine month a
of the year but that he was a able to serk haris the winter
months he said his support of his son,
used a for the support of his son,
used a for the support of his son,
household, of which the deceased was a member. The earnings
of his father was the only money, outside of his wages,
which Associated had or could depend on, for the support of
himself and family, and with the support of himself and family, and with the father while living with the plainty, reocived as a part of hit tails family expense, from the father
not only food and clothing, but small incidentals, such as
tobacco.

Appellants contend, that these facts do not show, that appelles was even partly dependent upon his father for support. But we are of opinion, that they do show, as a matter of fact, that the appelles was at least partly dependent upon his father, for support. Whether a person is dependent upon another for support, is a question of fact. It is not necessary that the dependency should be the consequence of a legal duty; but it is sufficient if it be a dependency in fact. Whether there is such dependency, is a matter which must necessarily be determined from the circumstances and conditions presented in each particular case. (Royal League v Shields, 251 III. 250.)

At the time of the death of appellee's father, it is evident, that the wages which he sarned, to a substantial extent, entered into the matter of the support of appelles, and his family, The particular extent to which appelles

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his death, the color

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Appeliants contend, that those lasts is and about that appelies and even partly descondent upon his inther for support. But we are of opinion, that incy to abow, as a salts, of feet, that the appelles was at least partly to salts upon his lather, for support. Whether a person is replicate upon another for support, is a quistion of tast. It is call the legal inty; but it is sufficient if it is a dependent in the feet feet. The feet is sufficient if it is a dependence of fact. Whether there is sufficient if it is a dependence in must necessarily be feteralised from the sircumstance of consistions presented in such particular into the feet here.

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was dependent is not material. It is sufficient if in any substantial extent, he depended on his father's earnings.

One who is sustained by another, or relies upon his aid in the matter of support, is dependent upon him to the extent of that aid. (Alexander v Parker, 104 Ill. 355.)

We are of opinion, that the suit in question was propely appellants brought against thexxxxxxxxxxxxxxivsaxyointly; and that appelles, under the provisions of the by-laws of the appellants organizations, was entitled to the death benefit in question, as a relative partly dependent upon the accessed member, who it is admitted, had been a member in good standing for more than fifteen years.

The judgment therefore should be affirmed.

Affirmed.

Legendent is not material. It is sufficient if in any notes of the dependent on his father's earnings.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 1 0 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

A COMPANY OF THE SECRET OF THE

- Decomposition of the following is a property of the proper

Gen. No. 6245.

Davis Milk Machinery Co. a Corp.

Deft. in error.

VS

Error to Grundy.

A. D. Tappen, Pltf in error.

Nichaus, P. J.

The Davis Milk Machinery Co. defendant in error, sued out a writ of replevin in the circuit court of Grundy County, against A. D. Tappen, plaintiff in error, and W. L. Avery, to recover possession of a milk filler, and a milk bottle capper, which defendant in error claimed were unlawfully detained by plaintiff in error, and said W. L. Avery. The replevin writ was served on the plaintiff in error, and the property mentioned was taken from his possession, and turned over to the possession of the infendant in error.

No service was had on W. L. Avery, and the suit was afterwards, and before the trial, dismissed as to him.

Defendant in error filed a declaration in replevin, and to this declaration aided a count in assumpsit, declaring on a promissory note executed and delivered to it by W. L. Avery. The case proceeded to trial by jury, who returned a vertict sustaining the issues raised by the declaration in replevin, finding the constable and possession of the recently described, to be in the defendant in error, and assessing its damages at \$50. The court entered a judgment upon the vertict and directing that the defendant in error have and retain the property replevied; and that he recover of and from the plaintiff in error damages in the sum of \$50., as fixed by the verdict; and the costs of suit.

The plaintiff in error afterwards, sued out this write of error, to reverse the judgment; and as a basis for the

. vis Milk Machinery Co. a Gerp.

Doit, in error.

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The ty, against A. D. Tappen, plaintiff in error, and T. E.

The recover possession of a milk filler, and a milk

I have a sintiff in error, and said W. L. Avery.

The result of the possession of the defendant in error.

The service was had on T. E. Avery, and the suit was after
ris, and hefore the trial, dismissed as to him.

Defendant—in error filed a legistation in repleyin, and this declaration wiled a count in assumptify, isolaring on a prominory note executed and islivered to it by W. E. ery. The case proceeded to trial by jury, who returned to the detailing the issues raised by the declaration in all with dinding the ownership and possession of the property on the december in error, and assessing its in the decimal the error, and assessing its first lirecting that the december in error have and retain the property repleyied; and that he recover of and from the the property repleyied; and that he recover of and from the interior, and assessing its the property repleyied; and that he recover of and from the

The plaintiff in error afterwaria, such out this ris.

writ, assigns the following errors; "First the court erred in entering judgment without appearance or plea by the plains tiff in error, without issue being joined; and without default having been entered against plaintiff in error. Second, that said judgment is contrary to law." The record, however does not subtain the claim made by plaintiff in error, in the errors assigned. It shows, that when the case was called for trial upon issues joined by the parties to the suit, the parties appeared by their respective attorneys; and, that thereupon a jury was called, and sworn to try the issues joined; and to render a true vertical in accordance with the evidence.

In the absence of a bill of exceptions setting out the evidence, it must be presumed conclusively, that the verlict, which the jury rendered, was sustained by the evidence adduced at the trial.

It does not appear from the record, that a formal plea was filed, but this cannot be assigned for error, if the parties valuntarily proceeded to trial without the formality of a plas. Issues could be joined in the case without the filing of such a plea. It was held, in one of the earliest cases reviewed by our Supreme Court, that the appearance of the parties in a case tried, cured defects in pleadings arising from a failure to file a plea. (Brazzle v Usher, Beccher's Breese, 35.) And it is the settled rule of law in this state, that if parties allow a suit to go to trial, without filing a plea, or without formal issus; or without formal pleadings, the error is cured by the verdict. (Ross v Red lick, 1 Scar. 73; Armstrong v Mock, 17 Ill. 186; Spencer v Langdon, 31 III. 193; Kelssy v Lamb, 31 III. 539; Loomis v Riley, 34 Ill. 307; Devine v Chicago City Ry. Co. 337 Ill. 280. Cook v City of Marseilles, 139 Ill. App. 536;

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for more than an additional consideration of the actions and interestive which are the actions of the action of the action of the actions of the actions of the actions of the actions of the actions.

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First Nat. Bank v Hiller, 139 Ill. 608; affirmed in 335 Ill. 139.)

It is quite apparent from the verdict of the jury, that the count in assumpsit, which was improperly added to the declaration in replevin, was wholly disregarded in the trial of the case; and that the issue tried was upon the allegations of the declaration in replevin. No objection was raised by the plaintiff in error, in the court below, to the improper joining of the assumpsit sound count to the declaration; and therefore this question which is argued in plaintiff in error's brief, is not really before us; and there is no assignment of error concerning it.

The record does not disclose any reversible errorand the judgment should therefore be affirmed.

Judgment affirmed.

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STATE OF ILLINOIS, second district. st. I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.
Cierk of the Appetitie Court.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6347.

Harry Allison, appellee

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Appeal from Boond.

Belvidere Scrow & Machine

Co. appellant.

Nichaus, P. J.

The appellee, Henry Allison, brought this suit to recover a balance claimed to be due him, as a screw machine operator, for wages, from the Belvidere Screw & Machine Co. appellant. The case was originally brought before a justime of the peace, in Boone County, where the appellec obtained judgment for the full amount of his lemand, namely \$68.60. An appeal was taken to the circuit court, and a jury trial had, which resulted in a vertict in favor of appellee for \$50. The appellant made a motion for a new trial, which was overruled by the court, and a judgment was entered upon the vertict; from which judgment the appellant prosecutes this appeal.

It was conceled in the court below, that the appelled had worked for an illust 196 hours. For which he had not been paid; and that the wages he received for such work was at the rate of 35% per hour; which would amount to the sum of \$68.30; but impollent claimed that the appelled, in his employment as a screw machine operator, in turning out some texts bushings, which the appellant had a contract to manufacture and deliver to the Fox Machine Co., had lone some of his work defectively; which resulted in damages to the screet land, to the amount of \$37.45; and sought to recoup these lands, against the amount admitted to be the appelled.

Appoint consense that the judgment should be re-

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of the state of the state. It is a state of the state of the state of the state. The state was priginally ortught before a justice of general in Boone County, where the arrelies obtained at fer the full amount of his leading, was ely (50.60. It is possible to the state to the struct ownt, was ely (50.60. This are taken to the struct ownt, on a jury this with resulted in a verifot in rever of a possible for the appealment rade a motion for a ten that, which was also by the sourt, and a judgment also she sed upon in the oty from which judgment the argestant state.

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question of damages is manifestly against the weight of the evidence; and secondly, that the court erred in giving the first instruction requested by the expeller.

only about one half of the amount of damages claimed in recompment; and that the verdict in this respect, against the neight of the evidence, because there was no controversy as to the amount of the damages occasioned by the defective mork; that inasmuch as the jury allowed about \$18.00 of the damages considered, that appellant had proved his case against they considered, that appellant had proved his case against the eding no lispute about \$37.45 being the amount of damages the jury, according to the proof, should have allowed that sum in full.

It appears from the evidence, that the work which

Phallos had to do with reference to the article manufactured

for the Fox Machine Co., was to irill and roam a hole in a

certain part of bushings; and the proof tends to show, that

the hole drivided in some of the bushings was larger than the

specifications of the Fox Machine Co. called for; and too

large for the use the Machine Co. desired to the state

bushings; and they were therefore returned to the state

of the machine Co., and a chedit was allowed to the contract of

for the sum of 37.75.

The record however idea not sustain the in the interest of the amount of the interest by policy is the proof of the amount of the interest by policy is the materials and labor on the manufactured articles returned to interest, was \$37.45.

but this alone dannot be considered, in fixing the reasure of the manufactured articles.

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who testified concerning the value of the manufactured articles returned, said, that the only value which the articles returned would have for sale, would be for junk; but he also said that he ald not know how much in dollars and cente, the value of the articles would be for this purcose.

There is proof that the articles might or wint not have any value for any other purcose.

The sutter of what the value of the articles returned to appellant, and retained by 1t, had in lollars and cents, was a necessary factor inestinating correctly the amount of damages appellant was estitled to; and in that state if uncertainty in the proof in that regard, the jury necessarily were left to conjecture concerning this feature of the case; and this court is in the same predicament. We cannot say, therefore, that the jury did not arrive at a proper conclusion concerning the matter of the damages; and clearly would not be justified in disturbing the verdict of the jury on that account.

Concerning the other error assigned, appellant claims, that appelled's first instruction, in the standard of comparison stated in the instruction, omits the element "of machine men who are engaged in that particular kind of work"; and there is force in the objection made concerning this defect in the instruction; but it is equally clear, that the jury were not misled by this error, concerning the questions which they determined; and it is manifest also, that the error could not have had any effect on the verdict of the jury, concerning the question of the amount of damages to be assessed in the matter of appellant's recomponent. So the error was harmless, and the judgment should not be reversed on that account.

There being no reversible error in the record, the judgment should be affirmed.

Affirmed.

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STATE OF ILLINOIS, SECOND DISTRICT.	ss. I, Christon	HER C. DUFFY, C	elerk of the Appellate
Court, in and for said Secon	d District of the Star	te of Illinois, and l	keeper of the Records
and Seal thereof, DO HEREBY			
said Appellate Court in the		-	
	In Testimony Wher seal of the said App	,	t my hand and affix the
			e year of our Lord one
	thousand nine hund		
		-	f the Appellate Court.

AT A TERM OF THE APPELLATE COURT;

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois: Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk. 200 1.A. 466

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

.AUG: 10 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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High Education of January 1911 And Application Applied to the control of the cont

Gen. No. 6349.

Benjamin Lounsberry, appellant.

VS

Appeal from DuPage.

George Boger, Exer. appoiles.

Min . au, 7.J.

In this of replevin was sued out in the court of DuPage County by the appellant Benjamin Lountmerry, if at the page, George Boger, as Executor of the estate of Albert Smart, Accessed, to recover the possession of a promissory note for the principal sum of \$1,000, which appellant plaimed, was donated to him by the deceased, Albert Smart, prior to his death; and which the Executor was wrongfully withholding from him. A demand had been made on the executor for the note in question, prior to the commencement of the suit; and the Executor refused to give up the note, on the ground that it was a part of the assets belonging to the estate of Albert Smart Isceased.

The declaration is in the usual form in cases of replevin but a count in trover tas added. The replies plended not uilty, non depth, non different in the replies plended in plea, alleging property of the note in the replies, as executor of the case by the court, the anti-section of the case by the court, the anti-section with this finding, and for sects, against the declaration of the case by the court of the declaration of the case by the court, the anti-section of the case by the court of the case of replevin the place of the case of replevin the case of replevin the case of replevin the cases of replevin the c

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George Boger, Exer. appelles.

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and it is concelled, that unless the note by gift cause mortis

Passed to the apportune, it was a part of the assets of
the estate of Albert Smart, deceased.

The deceased, Albert Smartm, was a bachelor, who, at the time of his death, and for a number of years prior thereto had lived on his farm, which was located in DuPage County.

The Lounderry, a courin of the leceased, was his housekeener.

Worked for the deceased a number of years, as a farm hand; and was so employed at the time of the death of the deceased.

The deceased kept the note in question, with other notes, and valuable papers, which he owned; his will end nome of his money, in a tin box, which he kept locked, in a secretary, or desk, in his bed room; and the keys for the locks on the secretary and the tin box, were on a ring, which the deceased was in the habit of carrying in his trousers pockets; Auring his sickness, the keys were kept in the same place.

Two days after the leath of the deceased, his two brot hers with two other men, came to the house of the deceased, to take charge of his effects. They found the tin box resited looked in the secretary, and the keys to open it, were on the key ring as usual, in the pocket of the trousers of the deceased, in the bod room; and when the box was opened, the note in uestion was found among its contents, which consisted of valuable papers, other notes owned by the deceased, to other with money in his pocketbook, and his list will. The tin box and contents were taken possession of, by his brothers, and then subsequently turned over to the estate.

The legal questions involved in the case are gractically the same as those passed won by this fourt, in the case of Lounsberry vs Boger, Executor, in 195 Ill. App. 35%. In

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that case, notes similar to the one in controversy here and similarly enjoysed, wers claimed by Sarah Lounsberry, as a gift from the deceased causa mortis. This court held in that case, that the gift was incomplete because of the lack of helivery of the notes claimed, in the life time of the coeased. The indersement on the note in question, when found in the tin box, by the brothers of the deceased, was as follows: "If this note is not paid until my death, pay to Benjamin Lounsberry. (Signed) Albart Smart". This \nlorsement olearly indicates, that it was the intention of his leceased, to have the title to the note pass to the a pellant, after his leath. Henry or, a second to this gase socks to establish a lalivery of the gift in question by the timony of farah Lounsberry. testi iei, that about a week prior to the death of Albert Smart, he requested her to call the assellant, Benjamin Lounsberry, to the sick room, which she did; and that when lant came, the deceased said to him, in her presence: "Ben, I lont think I will live many days; and now I will give you a thousand dollars; and I want you to use it towaris the purchase of a home; and I will leave it with Sarah; and she will give it to you after the funeral;" and that afterwards he gave her the keys to the tin box, containing the note and other property of the deceased, saying, "This is yours nowf Keep the sceretary looked, and after I am taken out lock the room, and let no one enter the room." She was, she then kept the kets in her pocket, and put the tin box back into the secretary, and looked the secretary; that the leceased aid not lak or the keys again, nor have them after that time; that she kept the geys in her possession; but unlocked the secretary to take out things or him, now and then, when he mantel them;

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of the effects of the deceased, she dropped the kers back into the trousers pocket of the deceased, where they found them.

Assuming this testimony of Sarah Lounsberry to be true, it is apparent, that if the deceased intended that the appellant should have the immediate possession and comership of the note, he would have passed it over to appellant at the time he told him he would give it to him; and inasmuch, as he did not do so, it tends to show that he did not intend that appellant should have the note at that time. The lirection that Sarah Lounsberry was to deliver the note to the appellant after the funeral, also excludes the inference that the deceased intended the appellant should have it before death.

Moreover the direction given merely emphasizes, what was already expressed by the endorsement on the note itself. The note was not separated from the other articles of property in the tin box belonging to the deceased; there was no real change made in the custody of the property in the tin box; and it is evident, that everything in the tin box, as well as the tin box itself, remained under the dominion and control of the deceased, until his death.

only part with the possession, but all control and dominion over the property. (Barnum v Reed, 136 Ill. 388.) The statement made by the deceased, to appellant, and to Sarah Lounsberry, concerning the gift, was not accompanied by a real change in his dominion or control of the note during his life time; nor in it have the affect of transferring the ownership of the note during his life.

In this case, as in the case of Sarah Lounsberry, the gift of the note was incomplete, but use it illand pass out of the dominion or control of the becaused, in his life time;

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and the intention of the donor is clear, that he did not wish the title of the note to pass to the lones until after his death. It was therefore an attempt to make a disposition of his property, to take effect after death, which is testamentary in its character, and not valid, because the requirements of the Statute concerning such a disposition of property are not complied with.

We are of opinion that the trial court properly found the appellee not guilty; and that the propositions of law and fact held by the trial court, are not inconsistent with this general finding; that, therefore, no error was committed, and the judgment should be affirmed.

Judgment affirmed.

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	Second District of the Sta		
STATE OF ILLING SECOND DISTRICT	OIS, Ss. I CHRISTON	PHER C. DUFFY, Clerk of	f the Appellate



6-00

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:

Hon. DUANE J. CARNES, Justice.

Present -- The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DORRANCE DIBELL, Justice CHRISTOPHER, C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 1 0 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. No. 6252 General Accident Fire & Life

Assurance Corp. Ltd.

VB

Appeal from Peoria.

Sophia Krekel, appellee Niehaus, P. J.

This is an appeal from a judgment for \$345 of the County Court of Peorla County recovered by the appelles.

Sophia E. Krekel, against the appellant, General Accident Fire a bire Assurance Corp. Ltd. The claim for which the judgment was rendered, to based on an accident policy issued by the appellant to John K. Krekel, for the benefit of his widow, the appellas, insuring him in the sum of \$300 against the effects of boilly injuries caused dir ctly, solely and independently of all other causes, by external and accidental means; excepting however, suicide, while same of insure.

John K. Krekel, the insured, was a saloon keeper in the city of Peoria, and lived with his family, in the rooms connected with and situated in the rear of the saloon, and in the second story above it. The policy in question, was issued to him on the 24th. day of November 1914; and insured him until the first day of January 1915. The policy provided that the insurance should be extended from month to month after the date mentioned, by payment of the premiums due for each month, on the first day of each month, in advance.

On the 24th. day of February, 1915, the deceased brose at about 5:30 in the morning, dressed and went downstairs, taking with him his revolver, which had been placed on the dresser the evening before. He descended one flight of stairs, which landed him in a little hall containing three doors, — one opening into his saloon, one into the kitchen, and the other into the lining room; he went into the saloon

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Appeal from Peoris.

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'cp. 10 Krekel, eppellee

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This is an appeal from a judgment for 'sin of the start Court of Peerrag Court of Peerrag Court of Peerrag Court of Peerrag Court of the appellant, Osered Addition that assurence Opin. Ltd. The claim for which the inare dered, is bounded on an accident policy focusitor instance of to John K. Krokel, for the rangific of his siles, and in the the canadist of his siles.

The court of the tajuries causes its city, solely and independently of all other causes, by external and accidental.

On the 34th. day of February, 1915, the decrease and continues, decreased and continues, decreased and continues, lin with him his revolver, which was to an it said that it is and the evening before. He descended one ridgill of utility, which landed him in a little said contraining that his saidcon, one into the linter rooms for and into the said to linter rooms for and into the said of the said of

and from there into the basement, where he stired up the fire in the furnace.

Both his wife and his motherinlaw testiff that they heard the deceased descending to the basement; and his wife testithat she heard him come out of the basement, and heari his footsteps as he walked around in the saloon below;! while he was in the salcon, she heard a souffle on the floor and, in connection therewith, the report of two gun shots in rapid succession. When she and her mother rushed downstairs they found the insured lying with his body parallel with and about two fest from the bar, his revolver lying about opposite his hips, and midway between his right hand and his body. The bullet wound had penetrated the left breast; and another builet hole was discovered on the inside of the side door leading to the outside of the building, which they discovered was open, or partly open. A chair had also been overturned in the saloon. The revolver contained the shells of two exploded cartridges; and showed the indentattion of the hammer upon two others, which apparently had failed to explode.

A declaration was filed, declaring specially upon the policy involved in the suit, together with an affidavit of the policy claim. The abstract however, loes not set out the allegations of the declaration. To this declaration the appellant filed a plea of the general issue, with an affidavit of merits to the whole of appelled a demand, because the insured committed suicide; and that the policy was thereby invalidated.

There was a trial by jary, which resulted in a veriict; but in version isnet ast out in the saturact. An
examination of the record, however, discloses the fact,
that the verilet was or the agree ise, and let it is essent

for there into the basement, there has stired up the Pile 1.

noth his wife and his motheringsw testify that biny heari the injected learnillar to the hose and a little tell tellhated him , the meand with to two once mid broad one fall whit ni . ootatega as he walked eround in the subject lelong half he was in the saloon, she hourd a sewfilt on to floor, if shade muy ond is tropy tol' . The result of the gum shade in Junt avocession. When she and her retimer recession termetaise I found the ingured lying with his body parallel with AND THE PROPERTY OF THE PARTY O end inad their old meanted your in har, sold aid etc. es a iy. The builet wound had penetrated the ledt breast; To obtain out no becomment new place to find to the land the six story and the street of the street, told with all will be the to be a party of the second of t to over other 1 to the middle. The mively a men limit was the state of the s to lectar the side of the series of the support of the series of the

color then the second of the colored bowever, cca not set cet to the declaration. To this recluration with me upperhant filed a plea of the concret issue, with the total colored issue, with the colored issue, with the colored issue, with the colored issue, with the colored issue.

There was a prick by jary, which r. unted to . v.oich; but the verdict isnot act out in the whitect. in the income the appelles's damages at \$345; and the court rendered judgment for such amount, which is the judgment, from which this appeal is prosecuted. Incomuch as the allegations of the laclaration, which were covered by the general issua, arc not set out in the abstract, questions pertaining to the issue by those allegations raised by the general issue, are not before us for consideration; nor are there any questions pertaining to the verilict, in connection with the special interrogatories submitted to the jury, by the appellant, before us for consideration; as the verdict is not set out in the abstract. From the pleadings set out in the abstract, it is apparent however that the issue, which was tried and submitted to the jury was, that of the alleged suicide of the insured; and it is not important, which side had the burden of proof upon the issues presented, inasmuch as there was no contest over the facts, and all the evidence which was adjuced in the case, was offered by the appellee.

The only question to be considered, is whether the evidence tends to show, that the injuries which were inflicted upon the insured, and from which he died, were the result of suicide, or were accidental. There is no direct evidence of how the insured was shot; as to whether he shot himself with suicidal intent; or whether he was accidentally shot, perhaps in a scuffle with an intruder into his place of butiness, is and must necessarily be, a matter of inference from the facts and circumstances proven. We are of opinion, that the jury were justified in the conclusion which they evidently reached, that the insured did not commit suicide; at any rate, there was sufficient evidence to justify this conclusion as a reasonable conclusion.

Appellant also assigns for error. that there was no proof of the notice to appellant, of the death of the insure!

28 required by the terms of the policy; nor any proofs of

-jait beteiner dance end in. (202) di especial e'esila . . ler ench the fire file file file for the fire files for the file files for the files f the apparatured alone in a dense of the least of the property of the specific of the contract the looled & flour, Thick at he covided by the reacons atom, and en det out in the abatewat, thustions partaining to the we by these bile ations folged by the concrul toque, not before we for constderation; nor are here any in tions pertaining to the verbiet, in sensection its of the special interpopulation and the total state of the plant of the of Junet, before us for contibustion; as the variable to ALL CAN THE HARdwise Bull mich affections 101 of Jun 200 For publication to a squared blocking bit blocking all the stration and - w = 10d and substited to the jury was, that of the lite. .! buls doily threstogal for at of bro thewart sad to sitch burden of proof toom the lanues greechtel, inch went constitue and contect over the facts, and all the svi lenco with was alsuced in the osse, was offered by to appear

The only question to be considered, is righter the verse of ends to show, that the injurior this rest this rest this set upon the insured, and from which he itse, sers to strait and the insured was shot; as to strainer as abot binasis with an entent of the sea applicable is shot binaself which and intruder he sea applicable is shot; and all all and intruder into his place of builtees.

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the death of the insured, delivered to the appellant. It is sufficient to say on this point, that the record shows, that the appellant waived formal proof of these matters, on the trial; and is therefore not in position to raise questions concerning this proof, on appeal.

It is evident however, that the amount recovered by the appellee, in the judgment, - namely, \$345 is in excess of the amount that the appelles had a right to recover by the terms of the policy; which is limited to \$300; unless the proof shows, that the insured maintained the policy in continuous force after its date, by the payment of the premiums on the date due; in which case, appelles would also be entitled to recover five per cent of the \$300 provided for in case of death; and for each consecutive month immediately preceding the date of the accident. It will be observed, that two elements are necessary to establish the appellee's right to recover the five per cent. mentioned; first, the maintaining of the policy in force continuously; and secondly the payment of the monthly premium on the date when it became due, which was the first day of each month, in advance. The insured paid for two consecutive months after the issuance of the policy, and thereby maintained the policy in force continuously; but he did not make his payment on the dates when they were due, the first payment having been made on the 7th. of January, and the second payment on the 2nd. of February; both payments being made after the date, when they had become due. Unloubtedly, the purpose of this stipulation to pay the additional five per cent, was to insure the prompt payment of the premiums on the dates they became due. The insured not having paid the same as required, appellee is not entitled to this additional five percent; but her right to recover was limited to the original amount of \$300.

It is evident however, that the amount recover A or

The Armelies, in the judgment, - newely, \$348 is is orsase and the same of th The rms of the policy; which is limiter to (300; noters . a proof shows, that the insurad waintained the policy in continuous force after its date, by the cayment of "he orerthe u on the fate ine; in which case, appelled would also be rot selivour COC; end to anno req evil revoser of belfite in sees of deathy and for each consecutive month imposite ele principle the date of the agoilont. It will be observed, confirmer and problem of proposition and proposition of proposition and proposition of proposition and proposition of the proposition and proposition of the proposition and proposition of the proposition mint to recover the five per cent. restioned; first, the minimum of the policy is force on a maintaining proper li near otth and no mulasay yidthom out to taemys Luc, which was the first day of such month, in the need That inumia paid for two consective months after the isruance el we policy, and thereby mainfuined the policy in large The and no dramped aid ower for hit of the tylonour was ther see agree the first payment buring tree each or he 7th. of January, and the second ourment to .if. er en wery; both payments being made after that hose, the out become due. Unitoubjedly, the garress to this will-We the pay the additional tire wer cont, sur to more comes year sublict the ampleans at 10 themyee tomor the Jes. To insured not buying maid the area as not little -ted players, art. Largefula and of Leftins on

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The judgment is therefore is erroneous to the extent of the excess over \$300. This, however, can be cured by entering a remittitur; and the judgment is affirmed at cost of appelles upon condition that the appelles enter a remittitur, reducing the amount of the judgment to \$300, within 5 days.

But if a remittitur is not entered, the case is to be reversed and remanded.

Affirmed, on condition of the entry of a remittitur of part of the julgment.

Appellee having entered a remittitur reducing the amount of Dollars the judgment to Three Hundred (\$300.) _the judgment is affirmed in the sum of \$300. at the costs of appellee.

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STATE OF ILLINOIS
STATE OF ILLINOIS, SECOND DISTRICT. SS. I. CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.
V V PI



6254

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice CHRISTOPHER C. DUFFY, Clerk.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 1 0 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6354

The People of the State of Illinois

Substitute Wilson
ex rel. A appelles.

VB

Appeal from Knox.

Fred Cutler, appellant.

Nichaus, P. J.

This is an appeal from a judgment of the County Court of Knox County convicting the appellant, Fred Cutler, of bastardy on the complaint made by the prosecuting witness, Icelson Wilson,

tain the charge is the testimony of the complainant, and her testimony consists merely of the hars statement, that she is an unmarried woman, the mother of the child in question; coupled with an assertion, that she had intercourse with appellant; and, that he is the father of her child. No circumstances are related, that in any way corroborate the complaining witness in these statements; she does not state when the appellant had intercourse with her, nor where, nor under what circumstances; nor whether there was one act of intercourse, or more. The ordinary incidents of time, and place, which are indispensible connected with the main fact to be proven; and are usually regarded as necessary elements in fully establisging the fact of paternity, are entirely omitted from her testimony.

The bare assertions of the complainant, that aggellant had intercourse with her, and was the father of her child were met, not only by the flat denial of the appellant, that he had any intercourse with the complaining witness; and that he was the father of herchild; but also by other evidece adduced on the part of the defendant, which militates strongly against the charge of paternity, as male against appellant.

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The People of the Shats of Illinois

ex rel. / appelles.

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Miss. Clara Snapp, testified, that the general reputation of the complaining witness is had in the community
where she lives; and that from that reputation the would not
believe her under cath. This witness also tratified, that
while she remembered but one person by name, who had
discussed the reputation of the complaining witness.

she also remembered other people talking about the matter,
whose names she could not recall at that time.

And the brother of the appellant, Thmet duties, tostified that on various coessions, and during the time when conception must have taken place, he had sexual intercourse with the complainant.

All this systems is in strong contradiction of the general statement of the conjustant in ress. I see last is the lather of her shild; and goes as well to impeach her credibility.

In a case of this kind, it is ensumbent on the reasontion to establish the charge of bastariy by the religit of the evidence. Mettes v The People ste. 188 Ill. Act. 17.

The weight of the evidence in this case, however, Hearly favored the appellant. A verdict in a bustarily case, that is against the weight of the evidence, should be not unlike.

Econy v The People etc. 65 Int. 441.

The language of the supreme court in the state of Jones v The People etc. 53 Til. 365, applies with pseudian aptness to the case at ber: "In this case the putative father testifies, he never had sexual intercourse with the complainant; and, that he is not the father of the child; other vitresses who are not impeached, and soom to be of unquestioned creitbility, tostify to facts contradictory to those stated by her;

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and, while she is not corroborated in any important partiular by any witness, we think the verdict should have been for the defendant. The case should go to another jury, and that it may, this judgment is reversed and the cause remanded."

STATE OF ILLINOIS, ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



BEST

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 1 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

·

Gen. No.6256

Michael J. Ryan appellee

15

Appeal from Stark.

John E. Harty, appellant.

Nichaus, P. J.

This was an action of assumpsit, comenced by Michael 1 lainte / in the circuit ourt of Stark County a le. The declaration against John E. Harty, Lac wegerrant. in the case consists of the common counts to which the appellant filed the general issue. The appellee set forth in his bill of particulars, filed with the declaration, that the appellant owed him \$1106, this indebtedness to composed of two alas medit items, namely, \$906, which appelled claimed the father of defendant defendant assellant owed him, and which appellant had assumed, and 1 defendant also an item of \$200 cash loaned to the a colinty defendant pellee testified that spellast executed a promissory note for the sum of 1106 payable to a porton, but retained it with the consent of apporton. A second in it is not leny the assumption of the \$906 indebtelness, nor the \$200 item, for money loaned him by the aggellac; but denied, that he ever executed a note for the same, and claimed that he had paid both items to a

There was a trial by jury, and a ver jet for appealed, and his damages were assessed at 1.00. After overruling a motion for a new trial, made by appealant, the court rendered julgment on the verdict; from then july ent this a eal is prosecuted.

There is practically but one question raised on this appeal. It is contended by the processant, that the was bound to prove his case by a second to prove hi

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... J. Ryan appolled

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This was endedion of assumptity, numerically 12.

1 st John E. Marty, the appearant. The isolaristic.

1 the case consists of the season counts to show the case consists of the season forms, the season of particulars, filed with the deciration, that it, the of particulars, filed with the deciration, that it, the of particulars and this between as accurate of them, and thich a collapse cashed the first of them of the season for the season of the season the season of the seas

sere was a trial by jury, not a vor of log a street assessed at [1000, Afterlover chir] or the constitution appropriately and the vertical from the vertical from the vertical from the vertical.

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There is practically but of that the first state of the control of

appellee arose, and upon which the appellant's defense is based, there are but two witnesses, -- namely, the appelles on the one side, and the appellant on the other; that appelles in sustaining his case, testified to the existence of facts constituting his case, and there is a direct denial of these facts by the appellant; and that hence, this leaves appellee's case without a preponderance of evidence to support it.

While it is true, that the statements made by these parties respectively, concerning the matters in issue between them, are diametrically opposite, there were facts and circumsta nees testified to by other mitnesses, which apparently contradicted the parties respectively, in some parts of their testimony; there was also some evidence which may be considered as corrobative of their testimony in some particulate.

But the number of witnesses who testify in a case, is not necessarily decisive of the question of preponderance.

If there are but two witnesses, and they testify diametrically opposite, concerning matters within their personal knowledge this does not necessarily result in a lack of preponderance concerning the matters; the question of preponderance is largely a question of the credibility of the witnesses who testify; and a question for the jury. The jury are the proper judges to determine which witnesses are more credible, or which of the parties to a law suit is telling the truth.

(Shaw v The People 81 III. 150; Boylston v Bain, 90 III.

283; Johnson v The Pople 40 DII. App. 382; affirmed in 140 III. 350.)

It is listinctly emphasized in Roylston v Pain, suprathat when a fact essential to a recovery, is sowen to by one witness, and lenied by another, of apparently equal crodibility it loes not necessarily follow, that there is no proponderanes of evidence; but in that case, there is a conflict of evidence

ce utituting his case, and those in a direct at adding to the common of the cappediumt; and treat, to he heaven and to without, a prepondersease of the court of the

Lie it is true, that the remember of the continue of the control of the continue of the control of the control

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This does not necessarily requif in a lab of retained that the concerning the satters; is question or repondentation.

Oncerning the satters; is question or repondentation.

Indeed a question of the confibility of a situe that it along the concerning of the parties to a law form.

Open judges to determine the satter of the content of the content of the parties to a law such it william to the content of the parties to a law such it william to the content of the parties to a law such it william to the content of the parties to a law such it william to the content of the parties to a law such it william to the content of the parties to a law such it william to the content of the conte

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which it is the peculiar province of the jury to settle; and it is for the jury to determine where the weight of the evidence lies, under those circumstances; and having determined the question, courts of review should not disturb their verdict. In this case, the jury, who saw the witnesses and heard them testify, were in the best position to letermine where the truth lay; and this court cannot say that the jury were wrong in the conclusion which they formed.

It is also urged by appellant, that inasmuch as the verifict was for \$1000 and the appellee's claim was for \$1106, it is apparently a so-called compromise verifict, and the court should have set it aside for that reason. We are of the opinion that the appellant is not in position to object to the verifict, because it is not for as much as the appellace claimed; and that there was no error in refusing to set aside the verdict, for that reason.

The record loss not iisclose any legal ground for reversing the judgment in this case; and it should therefore be affirmed.

Judgment affirmed.

The record lose act declease way legal grown as the contract of

STATE OF ILLINOIS, SECOND DISTRICT.	ss. I, Christophe	er C. Duffy, Clerk of the Appellate
Court, in and for said Secon	d District of the State	of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY	CERTIFY that the forego	oing is a true copy of the opinion of the
said Appellate Court in the	above entitled cause, of	record in my office.
]	IN TESTIMONY WHEREOF	F, I hereunto set my hand and affix the
	seal of the said Appella	ate Court, at Ottawa, this
	day of	in the year of our Lord one
	thousand nine bundred	and
		Clerk of the Appellate Court.
		U LE

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
AUG 1 0 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

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Gen. no. 6277.

Robbs En wess Company,
Appellace,

Appeal from County Court of Rock Island County.

Micholas Ferinel,

Appellant.

Michaus, P. J.

The appollos, Robbs Appress Company, commanded suit in assumpsit in the county count of Rock Island Vounty of into the appellant, Niekolas Forkel, to necover 3600.00 which it is claimed is the from the appellant on account of colloctions are by him for appellace. The deel ration filed by the appellace consisted of the com on counts, and an itemized statement of the co-count sued on is attached thereto showing the total anomatical collections of \$650.82 claimed.

notine of a plea in abase out, which the appellant workfield by affidivit. This plea evers that the demands in the declaration areas out of partnership to made doing business by the mount, and one neward A. Newis, acting and doing business by the made into a style of Tobbs Express Company, and in its behalf, antered into a verbal acreement with the appellant to conduct the business of harling freight to and from the several rathead depots in the city of Rock Island, and that the collections are a by him we a few harling done unfor the terms of this a return to by him we a few harling done unfor the terms of this a return near that is a factor of the presence to the same of the few of the first and obtain the collections are a built to the first and now a common to make the same of this are sense that the first and obtain them.

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declaration could only he excerbatist by court of actify.

The appellant, by leave of court, alternation withfiner in plea in abatement and filed the energh is me, and also be of act-off off, which were riterwoods arensed. In the confest notice of act-off the appellant admits the collection of the [654.68 and out in the account obtained to the deal metion but avers that by whether it has verbal agreement entered into by him with the Hobbs Trymons Congany he is entitled to one-hold of the mount collections into by the deal also entitled to one-hold of the mount collections into by the factor of the fine also entitled to one-hold of the mount collections into by the factor of the fine action of the factor of the fine action of the factor of the fine actions and company for harding contains make in conformity thereastly by the Express company it is indebted to him in the case of 1881.46.

There was a trick by jury a a so the conclusion of all the criticase in the case the court, on which of appeller, there will the jury to return a wordlet the line. The appellant the form so at 1656.02, which we accordingly done. The appealant thereupon made a motion to get aside the wordlet and for a new spiel, which obtain was everythed, and the court the coupon entered july so in a process of the appealace for the a sount found in the wordlet, and in the processed.

The principal error assigned, and and which ombreses all the questions for determination on this posse, is that the court or all the indirecting the randict, and the termination of the furnished as the grantien of the whether or and the up offers from a factor of the possession of the contract with the contract of the interval.

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It wo ward from the evidence that whe

in the jonard express business in the city and that the specimentis a teams ter owning i since eee team and doing the work of a teamster. It is as acravae 1. 1910, the modification and a write as a tempster concerning the handing which to do in the course of its business to and aron the government arsenal . . is located name the eith of Rock . . .

ACREEL on bewed into this day between label to Company and Wick Markol, thereby the Robbie Impress Company has appeal to employ High Ferial as tempster on Vac basis of Twenty-one pe I week, he to Aumish his own week and arm stood he is to do what builing we have to and from the Arsonal exclusively. Where it is impossible with its heavy. His continet to no into enlicet July July 1, 1911.

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1 0 0 0 of Mair Weitra..., dact Authore Lings or on page of the second secon .2 1.1.1 [1]01 in the late of the stail ... , ar the uner ... the parties were

The first in his judgment the written contract was signed after the vertex.

Concerning the healing which he appellant was to do under the terms of the written contract the contract itself would be the best evidence, and its forms in that regard could not be varied or changed by verbal postimony or conversation. It is well softlise that a written contract unsubiguous in its terms cannot be varied, contradicted or modified by parel evidence of anything that accurred at or prior to the time when such unition contract was appeared.

(Schneider v Sulser, SLS III. 67)

The terms of the written contract did not limit the handing to be done by appellant to government owned interials and supplies but included all the harding the Express company had to do to and from the Rock Island Arsonal exclusively.

The appellant's alteged verbal a recment cannot be considered a having the effect of modifying or simming the terms of the write m instrument in qualifying and limiting the mount or built of hading which was to be done under the terms to and from the warmal; and insample as it clearly appears that this alleged verbal again and or understanding was contemporaneous with the inclinated to a written contract and before the final emention, and provide agreement

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instrument. As the supreme court announced in Grab. v liken,
246 Ill. 465, "A written contract was entered into between the
parties in which they set down what had been agreed upon between them.
In an action on the contract it is presumed to have contained the
whole of the agreement and the various conversations relating to
the subject matter were merged in the written contract." This is
the well settled doctrine of law in this state. (Graham v Sevilor,
165 Ill. 95; Town of Tane v Farrelly, 192 id. 521; Telluride Power
and Transmission Co. v Crane Co., 208 id. 214; Schmelder v Sulser,
supra.)

While it to ears entirely improbable that the smollant would enter into a verbal understanding concerning the handin of nerchandise and natorial , with the appeller, different from the written contract in regard to the same matter and under consideration at the wars time, got assuming that the conversations testified to by the agreellant with Dewis, the president of the Empress company, did actually ocaus, they must be considered as merged and included in the written contract; nor our that be considered as in any very varying the terms or level effort of such written contract. The only contract, therefore, that doubt be considered as bearing upon the issues in this case was the writton contract. The court properly held that the alleged verbal ugreenent did not suntain appollant's claim of set-off, and that lected; h ving admitted that he collected the mount stated in appelled's declaration and account, the court traperly directed a wordiet for this abount.

The judgment should be nillinged.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, CHRISTOPHER C. 1	DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illin	
and Seal thereof, DO HEREBY CERTIFY that the foregoing is	a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record	in my office.
•	reunto set my hand and affix the
	art, at Ottawa, this
-	in the year of our Lord one
thousand nine bundred and	
_	Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice O T A 476
CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6148

William C. Siegert, appellee

VS

A most from hasalte.

Public Service Company of Northern

Illinois, a Corporation and the City

of Ottawa. appellants/

Carnes, J.

This is an appeal from a juigment of \$3500 for the plaintiff in a suit prosecuted by William C. Siegert, the appelled, against the City of Ottawa, and Public Service Company of Northern Illinois, a corporation to recover for injuries custained by appelles by reason of an alleged unsafe condition of a bridge on a public street of the city.

The Illinois river bridge is 942 feet long, with a driveway 24 feet wile, and was on July 8, 1914, the day in question the only means of crossing the Illinois river in the city of Ottawa. There was a large amount of travel across the bridge including interurban only atract car traffic. There mus laid along the east side of the wegon read of the oridge oxtending into the driveway about eighteen inches from the sile of the bridge an eight inch gas pipe used by Public Service Company, laid in sections joined by a flange or expansion joint projecting two inches, so that the diameter of the pipe and flange was about twelve inches. This pi was elevated a few inches above the lavel of the floor of the bridge on a dirent Youndation, but materian subsciled beyond the bags on which it rested. It was not covered or guarded in any day as i the change or stownsion constructed that a wheel acceping along the side of the pipe would cathh on the Manes. T acquainted with and accustomed to the use of this brisms.

Provided and addition THE CHIEF DAY I can be despropsition in this car, A tipe, is section in that for as as shift of the first than in the contract of the first of the second of the seco inter- all of a comment of all danking and to the state of th ala - Pila garet da l'Otto de agittat avvir cioniffi - I Autoria - Deposit of Julia Company and American Company and American . With I was his roll maintage to second to the control of the control of the process of the control of the co is a . I'm if the dienn are modificating milition to and the state of t with the first troop garaviri sit orni ma المنافية فنيف بديم مروف منهم عامل الوالولولولو You is Service Company, builder was trans are anaion joint englishing the factor, and to the district pages and page that each the co the transfer of the state of th to be delicated and 0 800 1 10000 - Tani lejuntamo TO MAKE THE REAL WARRANT

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irove onto it with a horse that was somewhat afraid of cars and set a street car. His horse shield to the east as the car passed him, and just then another car came up. The horse becoming more frightened veered to the east and started to run. The left wheel of the wagon struck against the gapine a few feet from a flange. The wheel slid along until it hit the projection of the flange. The wagon was thrown into the air by the force of the impact and appelled thrown out and injured.

in the giving or relations of instructions. No error in passing on the introduction of evidence is suggested. Appellee suggests error in giving instructions for appellants, but no cross error is filed that question is not before

The court instructed the jury, at the instance of appellants except as medified by the insertion of the clause in parenthesis, as follows:- "That while it is the luty of w city to use reasonable cars to keep its streets in a reasonably safe condition to drive upon, it has the right to devote the sides of the street to other useful public purposes. It may construct sidesalks of a higher grade and statters of a lower grade than the driveway, place curbing on the line of the guttersa, erect hydrants and authorize the arection of hitching posts, telephone, telegraph and electric light poles and the laying of water and gas pipes (provided that in so doing the streets remain in a resecnably safe condition for public use.) It may thus to a reasonable extent and for a uneful gargess public purpose narrow the driveway and exclude teams and horses alto, ether from the sides of the streets."

Appollants object to the rollification. We think the instruc-

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to the case. It loss not wear as appollants argue, that there is an imperative duty on the city to keep its streets in a reasonably safe condition for public use that is not answered by exercising reasonable care in that satter, but it loss mean that a city is not as a rule justified in devoting the sides of the streets to public purposes that will render the streets unsafe for public use. The question in this case is similar to that in Brennan v City of Streeter, 166 III. App. 134 affirmed by the supreme court in 356 III. 468 As said by the supreme court — "The question arises in each case whether the obstruction is of such a character that the passenger using the street or the pilewalk in the ordinary way and using ordinary care for his own safety is exposed to an unnecessary and unreasonable risk."

This is a question for the jury unless the circumstances are such that but one reasonable answer can be made. In the present case we regard the circumstances such that reasonable minds might differ in answering the question, therefore it could not properly be withirawn from the jury by a directed vertice. Yet the trial court was charged on the meticn for a new trial with a duty to determine whether the vertict was manifestly against the weight of the evidence, and we are required to review the juigment of the trial court in refusing to grant a new trial on 'hat ground. The majority of the court are of the opinion that the evidence does not support an affirmative answer to the question as stated by the supreme court above quoted, and that the saids of justice requires the submission of the facts to another jury.

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STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1910 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

William and the second to with

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Gen. No. 6246.

H. E. Tecloud,

Appolles.

₩VS-

Appeal from Iroquois.

W. M. Mogle and Frank A.Gilbreath,

Appollants.

CARLIE, J.

J. E. McCloud, the appolled, such M. H. Mogle, the appollent, and one Frank t. Gilbreath, in an action on the case for Frank and deceit in the representation of title to a tract of land. There was a jury trial and a verdict of not quilty directed as to Gilbreath, and verdict and judgment again I appollent for (854.87, from which judgment this appeal is taken.

A The feets disclosed by the evidence of substantially responding to the follows:-

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fore Thy 7, 1910, ewed one hundred twenty sense of Land in

Issaguene County, Mississippi, subject to a orthogo Land in

he gave a necessit subject on the Land to one has binney to resture
an indebtedness soil to help grown out of the following to resture

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cember 6, 1911, there was a finding " That publication has been and Gilbroath and his wife, the defendants in the swit, were tofaulted and the bill taken as confessed against them. The next day a decree of sale wasontered barring the defendants' equity of reachption upon the making of the sale. The sale was made pursuant to the order in the decree to Sam Filmey for \$500, which was approved by the court July 17, 1912. Hogle Gilbreath's supposed coulty in this land for an automobile valued at 01650, stoling positively that the title to the land las in A bergein was made and the signed a nemoranda in writing in which he agreed to furnish a dock of comprehen cumbrance and pay \$650, in each for the automobile. inquired about the value of the land a d the a cunt ortgage, which he learned was \$861,00. his cheek covering the 1600. cash payment and the \$261.05 necessure to ment and discharge the contrage, and to in with his deed to Issaguena County for record and did not discover for several months adjorwance that he induced that a chiomity of redembion, and seguine had no imembed no of a second mortgage and that he procured the Aleh Circet from Hilbre. We are wide to McCloud to save a recerting fiee, and wor me all

Issaguena Courty. The record of that court shows that an No-

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that he supposed there was no other encumbrance on the land, though dilbreath had before told him there was a judgment around him down there in Hississippi but it was for a gambling dibb and was not good; that he did not tell provide book the judgment because he did not consider it valid; he always understood a gambling judgment was not good, and that Gilbreath had told him there we see service on him; and he took Gilbreath's word that the judgment was invalid.

breath in the trial of this case, was called by with a a witness and tooticied that he prepared the deed from Gilbreath that transaction with had come to him to inquire about the land and said Gilbreath had suggested the the do so.

Pallissand at the time knew something about the title and knew about the Tinney nortgage. He testified that he went into the title protty thereughly in his discussion with the put it was mentioned that there was a second mortgage.

The ther appellant know of a second mortgage depents upon the credit to be given to Ballismand's and up ellant's testimony as to that matterl. That he /there are a second ensumbrance, valid or invalid, appears from his own testimony, and there is no question that he told appellan there was no enventurence other fit. the reilroad mortgage. The just were warranted in ballioning

nin Koma tiletto da 1810 kiralj i tra of the filter of the second and the second s odib in the lower of the ores, to be the or efficient i die en beek die est indicht de fisch and a second of the second of the second of of this are taken in the second of the secon This was a first first the 1,0101 100 100 1 100 100 and the second of the most of the Relliseard instead of expollent if in their j dynow he we make worthy of belief, and expollent can hardly be excused for statistical that there was no second encumbrance when he had notice what there was a pulling dobt on the ground that he supposed, as matter of law, such a suggest would be void. It therefore follows that expollent made a material statement to appelled as to the title of the land that he know was false or had no tout artist to well a fall of the land that he know was false or had no four artist to trade for the land. Under the eigenvatances we do not think appelled should be charged with negligate in acting on that statement. Therefore appelled to the representative expelled in an action for fraud and deceit, and if there is no substantial error of law in the record the verdict and judgment was properly rendered against him.

Appellant objected to the testimony of Pellissard on the ground that he was an attempt acting for dilbreath in the case; also on the ground that he was employed by Hogle to draft the deed from dilbreath and wife to appelled and whatever was there said was privileged. The law is well settled that while it is untitled and bad practice for a lawyer to act as both atterney and witness in the case case, still he is not disqualified as a witness. As to the other objection Pallissard testified to nothing that occurred at the time he drafted the doed that had any bearing on the question of appellant's prior knowledge of the title. It is therefore unnecessary to discuss the question whether he was disqualified from testifying to a convergation that countries. That time. His evidence as to appellant's knowledge of the second ortgage related to a time when it is not elained be war-

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we conclude that he seek on.,

Concretiate one self-office of the within the control of the constant, the lease of the conde la completa de la completa del completa de la completa del completa de la completa del la completa de la completa del la completa de la completa de la completa del la completa de la completa de la completa del la completa made of the manage is a fine of the street o docree. 🗡 It was objected in the court below to the authorities to a comy of the mortgage that it was "Not provedy contilled and incommieto and immoterial . The ottoestations are not full enough. The trouble pointed out here is that the contificate of the clork recites that he is en-officio recorder and the certificate of the judge fails to recite that the cloth is also recorder. are inclined to the coinion that the objection sufficiently pointed out that Coffeet and that it was error to admit the recard of the mortgage. The objection to the authenticated record of the deed made by the commissioner to Finney was " For the mencon a commissioner to make sale of this land, nor any law of the secta officed in oridence showing that the proceedings under this exhibit are according to the statute of that state, or that the court hea jurisdiction of the of lears and V.o subjectmenter to proceed as therein stated." This objection did not point out the defect have complained of and we are of the opinion that the court did not ore in admitting that record over thet objection. was objected to on the round that it did not slow regarded restinc on the defendants and first Thora is no oridence showing the walke laws of the State of Hispirsippi are, or the couries could be

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had upon the loss order to by publication as therein slown; that elements no evidence, under the laws of the State of Hississippi showing that the court had jurisdiction of the defendats or of the subject matter. There was no objection to the regularity of the certificates. Appellant's argument here is that there being no evidence of the laws of Hisrissippi the presumption is that they are the same as the laws of Illinois, and that the decree is bad in not reciting an affidavit supporting a publication and in not showing that supports are the founds.

The attack on the decree is collateral. The rule is quite different in cases of direct attack. (15 A & B Macy. 999) another jurisdiction although it is not founded on personal service. (ib) "There the copy of a record of a sister state fulcament judgment was a county, district or circuit court with a presidint judgo, a clork and a seal, and therefore a court if record, it may be or sumed that the court was one of general jurisdiction." (ib. 997) "A presumption of jurisdiction obtains where a court of general jurisdiction proceeds to litigate a cause, unless tore is a sowing in the record that there was no jurisdiction." (Forrest v Mey, 218 Ill. 165) In pleading a foreign judement of a court of general jurisdiction it is not necessary to set out the facts or laws conferring jurisdiction which will be pro-The state of the s (25 Cyc. 1552) In an relion on a judyment recovered in another state, it while be wesumed that the count had jurisdiculou of the subject matt and the arties in the arrense of around to the contrary, although the record may we incomplete or ambiguous on this point. (25 Cyc. 1577; VanTeter v Sankoy, 148 Ill. 586; Rosenthal

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v Renick, 44 Ill. 202) In an action of Cobt on a july and of another state by a court of reneval jurisdiction, the record frein silont as to cervice of process, the julyment is prime facile evidence of jurisdiction. "Howing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so." (Dunbar v Hallowell, 34 Ill. 168) See also. (Gundry v Hancock, 147 Ill.App. 49, 52) Where it is south to prove the contents or existence of a judgment of a sister state an authoriticated copy of the july ment itself is admissible in evidence, and sufficient. (Chamberlain v Britton, 136 Ill. App. 290; affirmed in 254 Ill. 246) A judgment in rem by a court of competent jurisdiction in one state caunot to collaterally assailed in another. (25 Cyc. 1591) Where a fragment had been obtained there is a strong legal presupption that the court had jurisdiction it was removed. (Wolch v Syles, 5 Gilmen 197; Bimoler v Dawson, 4 Scammon, 556; Morton v Critchffield, 18 Ill. 155; Mire on's Ins. Co. v Thompson, 155 Ill. 204) It is true if the record disclosed want of jurisdiction the judgment would be treated as a nullity, but we conclude, under the authority of the above cited cases, that the recital in the record that there was due service pervice, and that in a collateral attack it is not necessary that the record should show either the laws of Tississippi as to service by publication or that every individual stell was telms that La Unio di Ellia I. ocacline de la serie della ser The Cont Director City in Itilian ve a little and the Larguests to the control of the cont reacts A of the or the state of er i ng chi na tahar a sil (802 .EIF F.)

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が Company Comp Company Comp the time in question.

It is objected that under the instructions of the court the value of the cutomobile was taken as the measure of damages, and not the value of the Hississippi land. We think there is no error in this respect. Appelled parted with his automobile. There is no question a out its value. That part of the consideration mosting on the Mississippi land ontively failed. In an action one contract where the vengor rectives nothing for his property because of failure of the vendee to deliver the agreed property in exchange, he is ontitled to we over the value of his goods. (Beeler v Wolf, 195 Ill. 565) If appelled had received any title to the land and had lost through the fraud and deceit of speellent a portion of the value that a should have received, then the proper inquiry would have been as to the value of Fig land and that part of it he lost. The rule in covenant is that for a total breach of the covenant of neizen, or good right to conver whose nothing passes by the convergence, the secsure of tempes is the amount of consideration paid and interest. (Horne v Malton, 117 Ill. 150, 155, citing 2 Sunderland on Damages, 257, and Mrayer v Supervisors of Peoria County, 74 Ill. 282) It is indicated in for froud and doceit.

Appellant's objections to the instructions are covered by what we have almosty raid. In the progress must rest on the testimony of Tellisserd contradicted by the voiceppellant as to appellant's imported on the remainstrate of the remainstrate of the process that dilbracking a insulation of the testimony. It appears that dilbracking a insulation of the undertook to convey the title to this lumb to appellant along of the process that the best lumb to appellant along of the process that the best lumb to appellant along of the process that the best lumb to appellant along of the process that the best lumb to appellant along of the process that the best lumb to appellant along the process that the best lumb to appellant along the process that the best land to appellant along the process that the best lumb to appellant along the process that the best lumb to appellant along the process the process that the best lumb to appellant along the process that the best lumb to appellant along the process that the best lumb to appellant along the process that the best lumb to appellant along the process that the best lumb to appellant along the process the process that the best lumb to appell the process that the process the process the process that the process that the process the process that the process the process the process that the process that the process that the process that the process the process that the process the process that the process that the process that the process the process that the process the process that the process that the process that the process the process that the process that the process that the process the process the process that the process the

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only simple jurisce if he did not know of the encumbrance that he should take good is undertaking. But in bringing the nation in this form appelled undertook the burden of proving fraud and deceit. The jury found a verdict in his favor on that issue. The trial court approved it, and we see no good meason for disturbing it. Finding so substantial error in the record the juarment is affirmed.

Affirmed.

ការប្រជាពីអ្នក ដើម្បីប្រជាពីក្រុម ប្រើប្រធានិការប្រជាពីក្រុម ប្រជាពីក្រុម ប្រជាពីក្រុម ប្រជាពីក្រុម ប្រជាពីក្រុ ព្រះប្រជាពីប្រជាពីប្រជាពីក្រុម ប្រជាពីក្រុម ប្រជាពីក្រុម ប្រជាពីក្រុម ប្រជាពីក្រុម ប្រជាពីក្រុម ប្រជាពីក្រុម ប្រ

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STATE OF ILLINOIS, second district. ss. I, Christopher C.	Duffy, Clerk of the Appellate
Court, in and for said Second District of the State of Illi	nois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is	
said Appellate Court in the above entitled cause, of record	l in my office.
In Testimony Whereof, I be	ereunto set my hand and affix the
seal of the said Appellate Co	
day of	in the year of our Lord one
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	Clerk of the Appellate Court.
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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk 2 0 0 1. H. 5 2

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

to the

Gen. No. 5294.

Fred Pierce, appellee

VS

Appeal from LaCille

Village of North Utica, appellant.

Carnes, J.

Appelled Fred Pierce, claims to have been employed by
the appellant village to aid in the quarantine of one
Cyrus Young afflicted with small pox and confined to a house
in said village. He said sued appellant before a justice of
the peace for thirty four days (service at \$3.00 a day,
\$102.00 the contract rpice, and had judgment there for
that amount. The village appealed to the circuit court where
he had judgment on a verdict for the same amount. The village
prosecutes this appeal and asks a reversal on the ground
that the court erred in refusing a peremptory instruction
for the defendant, and that the verdict is against the law
and the evidence. There is no criticism in its brief and argument on any ruling in the introduction of evidence, or giving
or refusing instructions except the peremptory instruction.

Appellant's theory of the law is that under our statutes cities and villages are liable for quarantine expenses, but in no event in a case of this kind could they become liable for the expense of nursing; that if Young had money or property to pay for his nursing it was for him to do so. If not, it was a county charge under the provisions of paragraph 34, chapter 107, Hurds Revised Statutes. The decision of this court in City of Spring Valley v County of Bureau, 115 Ill. App. 545 is cited with other cases in support of that position, which, without further discussion we will assume to be the law. Appellant says that the services performed by appelled were as nurse or attendant and were not such as the village was amplitured to contract for; therefore.

THE PLANT OF THE PARTY AND THE and the second of the second of the second section of the second section of the second AD AND NO SECURE AND ADDRESS OF THE PARTY ADDRESS OF THE PARTY ADDRESS OF THE PARTY ADDRESS OF THE PARTY AND ADDRESS OF THE PARTY ADDRESS OF THE PARTY ADDRESS OF THE PARTY over to avianta and aprilling dilibration and leaders and . Bushing Loroth of the Magga Lead has all 🔒 💢 🔞 👢 the years for the first page that of the page and vol vis a drampast Lad inc. codici countres ed! (0, 1) in the contract of the form of the second of the contract of sources this up, soil and a stores in the property the defendance and the verticat in the three terms where for haind with hi aministration on all about . Contains and la The on day rading an a laste bootoned overcome, or this and fronter that the temporary and disease and the containing the first the The pit abbit they by should at despilliving believes well the state of the second security of the second sec era sa marita da marita palabana sini wati yan bi yinonong m I sat, it was a county objects among the country was graph 94, chapter 107, Heres teller tweets 100 Surpay, 115 III. App. 545 to store to at the about the . Il no wron the confidence and the and the little -the same and the fide of the first and self ad objections

 without controverting the evidence that appelledwas employed by authorized officers of the village to perform the services at that price, it insists that there can be no recovery because of a want of authority of the village to make such a contract.

It appears that Young was sick with small pox in a house in the villige; that The house was quarentined and a polles which Y police of Later rowers in i and the patient. The plane took a . . rge of e food and remained in the house making sure of the desired end that no one should be permitted to some in contact with the sick man. / It seems to us that whatever terms were used in the employment of appellee by appellant that it reant that his services should securs a quarantine. An effective quarantine could not have been carried out without some one doing substantially what appealed did. While the facts of the case present a question of some difficulty as lo not think the presumption from those facts that appelles was enouged and employed in a quarantine service is so manifestly against the weight of the evidence that we ought to disturb the ver lict. The julgment is affirmed.

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GMATTE OF ILLINOIS
STATE OF ILLINOIS, ss. I, Christopher C. Duffy, Clerk of the Appellate
Court in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

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CHRISTOPHER C. DUFFY, Clerk

E. M. DAVIS, Sheriff.

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TATE OF ILLINOIS, ss. I,	CHRISTOPHER C. DUFFY, Clerk of the Appellate
	of the State of Illinois, and keeper of the Records
nd Seal thereof, do hereby certify t	that the foregoing is a true copy of the opinion of the
aid Appellate Court in the above entit	tled cause, of record in my office.
In Testime	ONY WHEREOF, I hereunto set my hand and affix the
	e said Appellate Court, at Ottawa, this
day of	in the year of our Lord one
thousand	nine bundred and
	Clerk of the Appellate Court.
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AT A TERM OF THE APPELLATE COURT,

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AND THE RESERVE OF THE STREET OF THE STREET

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Gen. No. 6508.

FINLEY BARRELL

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BAKS FORMSE BARDE 60.,

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CARTIES, 5.

by Finley Barrell, the willows, ar inst Take Forest Water Co., a public service corporation, restrain it from shutting off the sater on promises because of his failure and refusal to buy a bill rendered for water furnished in the months of July. Au muit, and Soytember, 1913, alleged to greatly exceed the smount he had used in that period. A There was a prior hasting on a motion to dissolve this same injunction in which the motion was allowed and appeal to this court by the water company. We reversed the order everraling the motion to dissolve and remanded the cause for smother is aring on that motion. The common to proported (not in full) in 191 Ill. App. 269. | In reserved to the an enter governing the procedure on motions to divertive an injunction, and waid such motions should be vord and formmine upon the weight of the tostinony inhadiance by the rece thre position of

Y. J.III

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the hearing; that the complainant introduced no evidence and in our opinion the material allegations of fact in the sworn bill were met and overhorne by the answer under oath and affidavits read in support thereof by the defendant: that the record, as presented, indicated that the water meters were correct; and correctly read; and that statements of the complainant that he did not use so much water without any showing as to the basis of such statements were of Little probative value. We suggested that the facts and eircunstances as to the use of water on the premises might be slown; that there might have been a waste of water through the neglect of servants or some devect in the pipe, and that evidence negativing such a loss or waste should be offcred before an injunction should be permitted to stand. In stort, as the record then stood, there was little, if say, reliable avidendances evidence as to the amount of water used except that furnished by reading of the meters and prima facie evidence that the meters were accurate.

It is suggested by counsel that we were understood to say that the case depended entirely upon evidence as to the mechanical condition of the meters, and that the injunction should be dissolved unless a test make on the meters themselves showed they were inaccurate. He such conclusion was intended. The augustions in the opinion above noted indicate that we were then of the opinion that evidence other than of the mechanical construction and weaking all the meters might be furnished and should be furnished if the injunction was permitted to stand. On reinstatement of the

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case other affidavits were read covering the suggestions found in the opinion and indicating a sharp controversy as to many material facts. Presenting a case where there should be a final hearing of the evidence with opportunity-to cross examine the witnesses before determining the maints of the controversy. The question before the trial court on this motion was whether the status que should be maintained pending that hearing.

In Paxton v Fabry, --- Ill. App. ---, we reviewed and discussed the authorities on the duty of the chancellor on the hearing of a motion to grant or dissolve a temporary injunction. The statute provides for a hearing on such motion; and whether a temporary injunction should be granted, or, if granted, should remain in force depends upon eviden c produced at that hearing. But, as we pointed out in that case, it is not a hearing on the merits, and whether the staus quo shall be preserved by the granting or continuance of a temporary injunction depends not only upon the probability of the case/on such a hearing, but also upon the relative injury that might be sustained by the parties by the action of the chancellor in granting or refusing a temporary injunction contrary /to what might be found on a final hearing to be the merits of the case.

In the present case the allegations of the bill the minimum in the present case the allegations of the bill the months and the preliminary thereof requiring a hearing on the monits and the preliminary

and the later control once the state of the s and the state of the contract Edita in the last control with a garage cold ាម និកាលនៃ ខណ្ឌ ការនិសាជ ការនៃ បន្ទាប់ក្រឡាប ជា ការនៃចំណុះ បរិសាជ **១០ ខា**យក and the second second t II feeten In her THE THE PERSON OF THE PERSON O International Control of the Control a make the position e, about, a The state of the second 1000 1000 1000 1000 Y Comment of the and the second second second second second - 1 Jay 11 Januaria, de pridretty at 10 junction continues to the defect of the continues of the • Control of the state of

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in an fini out; notice the price of the sustained by appelled in wrongfully maintaining the present condition compared with that which would be sustained by appelled in wrongfully cutting of this water supply during that period.

We are therefore of the opinion that the court erred in its order dissolving the injunction. That order is re-

Reversed.

and published the married No. 1 HHO I HE BUSHOW STORES THE STORES OF T CONTRACTOR OF STREET

STATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of in the year of our Lord one
thousand nine bundred and
Clerk of the Appellate Court.
Oter way the Appendict Courts.



C. C. Millian

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916 the opinion of the Court was filed in
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Gen. No. 6262.

J. E. Pickens,
Appellee,

Appeal From Kankakoo,

City of Mankakee,

Appellant.

DIBELL, J.

J.E. Pickens, fell into a hole in a public street in the city of Kankakee at about eleven o'clock at night on July 4, 1915, and struck his left knee and other parts of his left log against a water pipe and a fracet thereon in said hole, and was injured threby, and brought this guit against the city of Irrania, the many near the against the city of damages for said injuries. Refore the trial he dismissed the suit as to defendant, Kankakee Nater Works, At the close of the trial a verdict was directed for the defendant, Herseher, There was a verdict against the city of the defendant, Horseher, Plaintiff had judgment and the city prosecutes this appeal.

It is contended that plaintiff ormet recover because the notices filed by him with the city clerk and with the city attorney did not contain the address of the physician, as required by the statute relating to such the line that res cet the notices said: " That Dr. J.A. Chertin was the attending physician, and that he called in Dr. C. C. Smith to examine the injuries." It was proved that the time

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of the accident Dr. J. A. Guertin held the official position under the city of Mankakee of city physician and that there was no other Dr. J. A. Guertin in that city at that time.

We conclude that under the Minciples laid down in McComb vs City of Chicago, 265 All. 510, the notices were sufficient in that respect. We must assume a that the executive officers of the city knew the residence of the city physician, and by the exercise of reason to dilignose soul association and fact for which resert to the attention plantation and each or important.

It is urged that certain opinions empressed by the witness, Dr. Greenman, were incompetent because they we e based upon subjective symptoms. Dr. Guertin attended the plaintiff until he went away on his vacation, and he left directions with the plaintiff to go to Dr. Brown in his absence and the plaintiff did go to Dr. Brown, but he also went to Dr. Greenman, and Dr. Brown made a thorough examination and treated the patient, and the plaintiff then went to Dr. Greenman and was treated by him twelve or fourteen times thereafter . Coinions of a six ician founded in our t unon subjective crumtoms, in nowled a home is derived by the phydician during his treatment of the patient are competent. West Chico o St.R.R.Co., vs Carr, 170 Ill. 478; Greinke vs Chicago Other tripe things of the Things of the tripe of cuit h (leen becaute of a the daintid word to red ander, that it must be that he intended to call Dr. argued. Greenman as a witness, and that in reality the examination must have been for to purpose of qualifying him as a witness

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no support except in the fact that Dr. Greenman was called as a twitness. It was natural that the different physicians attending the plaintiff should be called as witnesses. The witness to all much ied from giving his opinion founded on subjective symptoms by the mere fact that after having treated the patient for some tin he became a witness in his only.

The injury occurred under the following circumstances: There was in Mantalice a public park known as Electric Park in or near the southeasterly part of the city of Kankalice. It was reached by Osborn Avenue, a public screet of said city. There were nine or ton thousand people at said park in the evening of July 4, 1915. The evowd started to leave the . sh to go back to the city at 10:40 p. m. She str et car line entered Osborn Avenue at its south end and went north for some blocks, and thence by different directions to the e war of the city, When the crowd reached the street car live rily suspended for some reason not emplained. some three or four thousand veople started to walk back into the city, going north on Osborn Avenue. Plaintiff and his wife had apont the evening in the park and were a one the s ralking back. The south end of Othern Avenue was in on unfinished condition. There we no sidewalk on sither side, The street car track was in the widdle of the atreet, such slore was a place proveled by teams last of the abreet our track, a ast of that some wass, and east of the terminate

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sidewalk would ultimately be laid. There were also telephone poles and perhaps some other obstructions between the place where the vehicles traveled and the place where the sidewalk would be. Plaintiff and his wife traveled along the street car track. When they reached a place somewhere near the center of a plack they saw on the east side of the street that there was a sidewalk from there north, and that some of the people traveling in the street had gone over to and were walking upon that sidewalk. Thereupon plaintiff and his wife turned and went to cards the sidewalk for the purpose of getting out of the street car track and out of the place where the vehicles naturally went, and getting upon the sidewalk and over to the place for pedestrions. was no cure and there was no parking in the ordinary sense of that term, but as they passed from the place where the wheeled vehicles had been, they went upon the grass on the sale level until they had almost reached the sidewalk. There was in the ground, not far from the sidewalk, a hole three feet wife and from four to eighteen inches deep, according to the varying testimony of different witnesses; and up from the center of that hole came an iron pipe, and on the top of the pipe a few inches above the ordinary level of the ground was a faucet. Flaintiff fell into this hole and struck his knee against the iron pipe or faucet, and was seriously injured. Some witherses placed this hole at one foot from the sidewalk, and others at to feet, but plaintiff testified that as he fell, he fell with his face on the sidewalk, which indicates that he was correct in toring that. 11 wt low a he showelf. This hole hid been there for more than two months and a half in substantially the same condition, so that the city must be made to have had no biac

. . . Are and recommend , day of globarican birow Michael and parkage acoust the little will be a first traditional for the Research Research . I we also for air will good. Deferred while aid and bill thouse nowledge and first rosau off is a reache attential to the ind gone over to and word with a or it we to will. I of the free her Secrete obtain him has the besidence of lik um uma davmilih lifu na dara darik davi tid sod and the second s . The second of the second configuration of the second for all the second of the second for all the second of the . . c curr out. There were no precising for and a like up states . . m, bub og thety pageet drop mis til et bestide folk et bled skut track. 🗎 1,000 unt they had alread the core of the sall, they had been a line of the and , not for them the mid. I have a leaf a pure a first of a a the olighteen implies drap, researcher be if the table a or or the lawreed are appeared for fine early and the level = level of the ground of a level. . I at a first the add one pillerofite of the most foot and the A. Mina of , Mina of the jest Bolivinos de

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i - - 11 - heve regelred it before the toccasion, Plaintiff did not know of its existence, and the night as down. Contends but it was not bound to exercise reasonable care to keep that place in a reasonably safe condition for foot travelers, and that therefore the instructions which informed the furt of the Tube of the city in relation to its streets neve in roper. Reintiff and his wille turned to go upon the sidewalk from the center of the street soon after they had wasned the south and of the signwalk as setually laid, and we think that the lity might reasonably expect that persons going along that street from the south would take the traveled way in the center of the street until they reached a place where there was a sidewalk. and would then turn to to upon the sidewalk; and that the jury might reasonably find that it was not a leak of ordinar care for the plaintiff to go where he did under the circumstances shown in the evidence. I The instructions in regard to the Saty of a city concerning Ats streets were stock have been many times approved by the courts. opinion that a cause of action was shown and shown that had any tendency to defeat it.

The second secon

of plaintiff was in a certain contracting business in Watsolm.

A branch of that business had been appned in Hankeles, and plaintiff was in the real thoract, and apparently in a remaining with his father. He received contain wares per week, and thereto fifty or each of the profits made upon the limitable.

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business; and he testifiedle and it is not disputed, the prior to this accident he was making (1800.00 per year. The injury produced an inflamation of the inner lining of the knee joint. that hmes as usually required in the active duties of his business. He was laid up for a certain length of time; had walked with a came and is calle to walk but little witout a came, He has been able to figure on contracts but not to perform the active daily services for which he formenty had been paid; and since that time he has been able to make only \$400, or \$300. per year. According to the cylien o his loss of earnings To Rich likely to recover the cumplete use of the knee in time. city brought proof tending to slow that he had been seen riding a bicycle. He do hed hed ridden a bicycle. The city offered witnesses who had seen him walk when they did not think he used a cane. He testified that on some of the occasions they named he did use a came, and that he walled very little without a cane. The injuries he suffered were not merely to the Imee but related to the whole of the loss i carnings, and his pain and suff and . physicians and his other enjoyees for sielmess to which he testified are considered, by are unable to say that the verdi is too large. It is true that the extent of plaintiff's injuries largely depends, upon his rox statement of the pain and suffering and of his/inability to walk and to perform the ordinary duties of his colling because of thisinjury. It is

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true that he may be misrepresenting the extent of his injuries to the jury, but they believed his testimony and the trial judge has approved it, and most of his statements as to his pair and suffering and the effects upon his employment are expressly testified to by him, and are not disputed by any other witness in the case. Under all these circumstances we cannot say that the judgment is excessive.

The court gave eight instructions for the plaintiff and we consider them to be substantially a correct statement of the law. The court gave sixteen instructions as offered by the defendant, and slightly modified and gave another instruction for defendant, and these instructions fully state the law favorable to defendant. The court refused eleven instructions requested by the defendant but so far as they were competent, they were embodied in the instructions given. Two or three of them were so involved that they might reasonably have been refused on that ground. We are of opinion that the jury were sufficiently and correctly instructed. Finding no reversible error in the record the judgment is therefore affirmed.

Affirmed.

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STATE OF ILLINOIS. SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
nd Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the
aid Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois: Present -- The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DURRANCE DIBELL, Justice. 2001 1453

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in AUG 1 0 1916 the Clerk's office of said Court, in the words and figures following, to-wit:

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Gen. No. 6331.

Jeannette E. Lewis, Admx. ctc.

appellant.

Appeal from Co. Ct. Peoria.

New Amsterdam Casualty Company,

appellac.

Dibell, J.

This is a suit by the executrix of the last will of Thomas B. Lewis, deceased; ucon a health and life defendant insurance policy issued by appelled to Thomas B. Lewis on June 39, 1914. Lewis was taken ill in August 1914, and fied on March 16, 1915. His wife became executrix and brought this sait as such. The policy provided for sick benefits of 25 per week. No sick benefits were paid. There was an acpropriate declaration upon the policy. Certain pleas were filed, to which a demurrer was sustained, and certain other pleas were then filed upon which issue was joined. The pleas were each in bar, except as to \$19.73 tender made before suit. The first plea was the qualified general issue. The remaining pleas were that the application was made a part of the policy, and that the policy was issued upon the consideration of the premium and the statements in the application, and various statements in the application as to the good health of Lewis were denied. Special replications were filed to the special pleas, and issues were joined upon said replications, and there was a trial by jury, at the clove of all the evidence the court instructed the jury to return a vertice for defendant, and such vertice The proposition with the section.

The parties lived in Proria. George Reacan was a

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-capelles at Peoria, and this policy was issued from his office upon an application brought to himby C. K. Geries, he was also a life insurance agent. Lewis appalied to Gerdes for health and life insurance, and Geries applied to Reagan. Apparently Geries prepared a first draft of an application and this application which was granted, was in fact written so far as the typewriter parts were concerned, (which were the ones that it was claimed were untrue), in Reagan's office and by his stenographer, by Reagan's direction, and lelivered to Geries. It be claimed that this application was fraudulent. There is no proof of that except by inference. Gerdes signed Lawis' name to the application. Lowis never saw it. Gerdes testified that he considered himself authorized to sign Lewis' name to it. Gerdes testified that he took the statements as to the condition of health of Lawis from applications which Lewis had made to him some years before. Geries denied any knowledge of the facts concerning Lewis condition of health which tenderto make this application untrue. The application was untrue, and if wals by Lawie or ic b Gordon as his agent it would invalidate the colicy. East When plainting sought to show that Ceries was in fact the found on? acting for anselled and had frequently acted for asselled before, the court austained objections to the questions by which it was sought to prove the connection between Gerles He was allowed to state that he had acted and appelles.

which it was sought to prove the connection between Gerles and appelles. He was allowed to state that he had noted default for appelles before, but that answer was then excluded. If Gerles was gent for appelles and not for Lewis, then it is a serious question whether appelles would not be bound by this policy, unless, thieself, it appeared that Gerles was engaged in an effort to defraud his principal, the appelles, and there is no evidence sufficient to warrant that conclusion. We are of opinion that the pourt erred in refreshes

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to service and late in the control of the control o Letwoen Carios and appoller. The proof showed that Gardes did not receive any pay from Lewis for obtaining this insurance, but that Reagan was entitled to a certain commission as between him and artelles, and that Reagan paid a part of that commission to Gerdes as his compensation for the work. Appelled introduced in evidence a letter from the superintendent of appellee to Lawis, lated Fobruary 1, 1915, notifying him that the company had cancelled this policy, and that they enclosed therewith their check for (63.13, in full of the oramium which Lewis had paid a d interest to that date. and also a registered return receipt admitting the receipt of this letter of Fabruary 1, which was signed "Thomas B. Kewis per G. C. Lewis. "Objection was much to the competency this evidence, and that objection was overruled. There was no proof who G. C. Lewis was, nor that he or she had any authority to sign the name of Thomas B. Lewis to that receipt nor that Thomas B. Lewis over did receive that letter. This evilence was incompetent until the agency of G. C. Lewis had been established, or the fact that the letter did reach Thomas E. Lewis By this improper testimony the record was . Las to show hist for primits, of int rest it con but own claimed to have returned the premium and the interest thereon, the plea of tender, by which it alleged that it had tendered \$19.73 before the commencement of the suit, which tender it had kept good, shows that appellee was admitting some liability under this policy becies the liability to return the premium inii. which is so admitted is not shown in the case. For the errors specified the judgment is reversed and the cause rotanish.

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STATE OF ILLINOIS, SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine bundred and
Clerk of the Appellate Court.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice. 200 1.A. 503

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

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Gen. No. 6295.

Dumont, Roberts & Company, Appelles,

Appeal from Teoria.

Alfred L. McDougal, et al,
Appellants.

DIBELL, J.

On August 8, 1905, Alfred L. McDougal delivered his promissory note to Dumont, Roberts & Company, a corporation, for eleven thousand four hundred and sixty dollars, due one day after date, that being the amount then found due from him to them upon a settlement. November 9, 1907, to prevent the payee from at once suing the note, he executed to the payer an assignment of his interests in the estates of his mother and of his father, who were each then living. The estate of his mother is not involved here. By that instrument he assigned to the payee of the note " all interest which may horoafter accous to me as heir, legates or devisee of John InDougal." That instrument provided that if the note should not be paid at his father's death, it should then be paid " out of raid into st which/accrue to me as hoir, devisee or legatee of haid John McDougal, my dather." John McDougal died June 18, 1914, testate, roking certain of his sons trustees and giving Alfred four species of property; cortain real estate at once; a share of the personal property to be distributed by the executors after the payment of febture a share in the income of certain real estate to be held in

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trust till March 1,1915; and an interest in said last mentioned property in fee on March 1, 1915, if Alfred was still living. The debt was not paid, and on June 27, 1914, Dumont, Roberts & Company filed this bill against Alfred and against the executors and trustees to obtain the payment of the balance due on caid note out of the interests so assigned. a defense that the note was without consideration and that the assignment was obtained by duress. The cause was referred to the master to take and report the proofs and his conclusions. He found in favor of complainant. Defendants filed exceptions which were overruled. Thereupon, by leave of court, hifred filed on amendment to his answer, in which he set up that between the time of the execution of said assignment and of his father's death, he filed a voluntary petition in bankruptcy and schodulod this debt, and complainant did not prove it amainst his estate, and he was discharged in bankruptey, and that said assignment was defeated both by the discharge in bankruptcy and by the fact that the assignment was void because it was a contingent interest. It does not appear by the abstract that said cause was again sent to the master, but it is treated as if the had been proterly heard. There was a decree finding the amount due the complainant to be sixteen thousand three hundred and nineteen dollars and thirty-two cents, and directing the interests of Alfred in his favner's estate to be sold to pay the Jobt. When the bill was filed not all the interests of Alfred and become fixed, but they had all accrued before the decree was rendered. Alfred and the executors and trusters appeal from said decree.

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A DEC. L. E. A. E. C. COME NAMED TO SECURE A SECURE.

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It is the settled law of this state that estates in enpectancy may be assigned and that the assignment will be enforced in equity when it ceases to be an empectancy and becomes a vested interest. Bonough v Garland, 269 Ill. 565; Cumnings v Lohr, 246 Ill. 577; Bolin v Bolin, 245 Ill. 613; and many other cases. The fact that a will may make the empectancy contingent does not defeat this rule. Ridgeway v Underwood, 67 Ill. 419; Hudnell v Ham, 183 Ill. 486. Where the astignor of such an expectancy is afterwards adjudged a bankrupt, and is discharged, subsequent enforcement of the Lien created by his assignment is not barred by his discharge in bankruptey. He is not personally liable, but the lien which equity imposes upon the property so assigned is not barred by the discharge. Bridge v Kedon, 163 Cal. 493, 43 L.R.A. (N.S.) 404, and a note upon that subject in the last named report; Citizens Loan Association v B & M R.R. 196 Mass. 528, 82 N.H. 696; Mallin v Wenham, 209 III. 252; Wabash R.R.Co. v Neyer, II9 III. App. 104. In Pomercy's Equity Jurishrudence this subject to the discussed in Chapter 7, relating to Mauitable Liens, and in Section 3 of Chapter 8. relating to the assignment of possibilities, expectancies and property to be acquired in the future. There are authorities in other states holding differently on this arblact, but we regard Hallin v Wenham, supra, as decisive that the decree of the court below is in accordance with the law proveiling in this state.

The decrea is therefore sifimmed.

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2. 826 Ill. 877; Dolin v Helin, 620 201, 615; *** - . . .

n expectancy is subtract and adjuly of but in it.

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STATE OF ILLINOIS, SECOND DISTRICT. SECOND DISTRICT. SECOND DISTRICT. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine bundred and
Clerk of the Appellate Court.

8

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and sixteen,
within and for the Second District of the State of Illinois:
Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk. 2007 7 1 500

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



Con. No. 6505.

Charles N. Farrell, Administrator, etc., Appellec,

-VS-

Appeal from Pecuia.

Meuben Bruce,

Appellant,

BISENA J.

John Farrell lived in Peoris and amed his home are the Lousehold fur iture therein and other real estate, and hold some certificates of deposit issued by the Misst Matienal Mank of Meorie, and "od these and othe papers in a box in the collety deposit vaults of that bank. He had had several wives The had been diverced from him. He had four children, all grown, but was very seriously estranged from them. His lart wife was not the nother of his children. Then the procured her divorce from him in 1909, she resumed her former name of Maretta, He had long and the invention they more of his children should receive any of his property. In 1912, when no was about eighty years old, he became seriously ill and feared that this would be his last illusta. Two Warstin cale to him, became his housekeeper, and took care of him till lo died. He had for the opinion that a will was much more likely to be contacted and defeated them direct gifts in the lifetime of the domor. On laplater 14, 1912, he sent for friends, including a japtice of the reaso, and had deed of the homesteed pronumed, converting a like entate for her life to Tire. for the, with a monder to headen Trace at

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The Mis here diverges and simple states and states and states are states and states and states are states and states and states are states are states and states are states are states and states are states are

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trustee " to build an old . an's home." Inthe deed Harrell reserved a life estate to invelf. We executed that deed and a livered it to re. Warstta. He caused to be propared a doed to Rueben Brue of other real estate owned by him, reserving a line estate to himself, and executed that aced and delivered it to Emace. He caused a bill of sle of the household furniture from himself to Tre. Haratta to be orepared, and reserved therein a line estate to himself, and orecuted that bill of alle and delivered it to Francoratia. Ho sent two of his friends to the bank to procure his box there, and comb with then on ender directing the benk to deliver their born to them. When they reached the bands bloom did not have the key without which it could not be a tained. and brought the box to him. The certificates of acposit were taken out, and by his direction one of his friends began writing on the back as ignaents to Reuben Bruce and ho began signing his name to those assignments. He was in bod, and whom a paper was ready for him to sign he was proposed up in bed with a book, placed on his lmoss upon which He/come wired and only partly wrote he did the signing. his simuture on the fifth certific to, of which cortilicaten there were twenty-fire in all. An attendant suggosted that he lauve the siming of the rest day, and he handed to Bruce Mas time which he had/signed at told him with them so pry his funeral empone s a dealer deliver and the most decould be his, and told the a ount he wisher pail on one debt, which he did not wish paid in fall or he comsidesed that the anomat of most him has not inch. The hould

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CA PUCLES COLD BUILDING TO cipaling Property And dis they be the persons there present, to whom he had Light to the last and the state of the same gradings) of the legislation of to consider thoron a select of the contract of mort, not have an excellent to be seen por to the common to the commo Average of the control of the contro innto, mooni to v - 110 mm/co = amov i i E Stolloon (to the state of the e in a section , and . . . 9 , n , The state of the s

pensus here presen . 22 . 25 . 25 . 25 . fred Land t -ŗ I make the control of A STATE OF THE PARTY OF THE PAR and the second s A STATE OF THE STATE OF THE STATE OF

we revorced by this court in Ferrell v Bruce, 190 ILL. ().

509 for the reasons there stated. Upon a record which who administrator h d a verdict and a judgment for (2,119.86, from which Bruce prosecutes this arreal.

convoide that this action cannot be main sined both breaks trover does not survive he because appoller cashed the certificates in the lifether of John Fernell. He cenclude that he appollers were refully obtained these contilicates and converted them to his own use, trover would his in the name of Jahn Jerusell, and that that the cetion survives to the administration where to the provides the actions of the Administration of, which provides the actions of the feet of the appointment of them to be converted would survive. The feet of the appointment of the provides the actions of the feet only provides the action of the action of the action to be converted would not have action only prove that appolled had converted them to his action only prove that appolled had converted them to his action.

Therefore, the fact would not defeat his administration.

The proof is conclusive that John Narwell did as implied confidence of the in the memor described and deliver than to druce and the true are to them. Their percention by Druce was evidence tend in the chot was applied to a naturally relivered to him and the true word tend. The authorities upon the imbject were collected by un in O'Connor v Percents, 135 This appeals we impolied to the contration was and is she to be able to the true word to be the contration.

Formall the containing these metants to the uses to be instinct.

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of transferring those contificates to conclinat. The readof proof was upon embelies to show that condition. That we 7 Waters, 222 Ill. 26; Dickerhoof v Wood, 267 Ill. 50; Who proof did show that John Farrell was hateful, bitten towarfa his children and profess. There is no wood that he was acting under any insune delusion. The harshness of his sentiments and his medenity were not prounts for setting aside his disposition of his reporty. Shell & Weldon, 259 Hil. 279, We work find in this record a very strong memorance in the evidence that John Marrell on September 14 and 19,1918, vas in the full was ession of his mental feculties, was ontirely competent to transact the frusthess in to be the street en ongaged, and was doing what he had long before wherethe we donamely, to dispose of his property to the exclusion of his children. Probably the jury were actuated by a feeling has ine ought not to have done this. But this was his proceedy, and if he had sufficient embal capacity he had the legal of his to give it to others than his children, Dicherhood v , surre. And for sucht that we can know he may have been justified in doing so. But whether he was justible or not is impaterial. Appelled contents that the verdicts of two juries for him should be a melusive upon us. This fully of appellate courts to set aside a vardict that is clearly araingt the weight of the order need here been wary ti so announced by our surveys secures, (Chicago Chiraly, to.v lood, 206 Ill. 174) Toro the burden who meen appel ec, ont with closs presentered of the existence seems to us we is with

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regard, find for an inclusion of the continuous fraction of the continuous find and continuous for the continuous find and continuous for the continuous fraction and continuous for the continuous for the

 appollant. Appollant's withouses did not state every debull of the transaction emeckly alike. The faction any they are on the citation in the probate court did not always correspond procisely with their bretimeny at this trial. The polloe argues from this that the whole story is unt up and was framed up by these witnesses to deprive the benefit heirs of their dether's estate. If I are had been also have interest of their dether of seal witnesses and in the tentheony of each of different earlier of collusion and a manufactured oberg.

After all the criticisms when this evidence are considered, we are if the epiticisms when this evidence are considered, we are if the epiticisms when this evidence are considered, we are if the epiticisms when this evidence are considered, we are if the epiticisms when this ovidence are considered, when are if the epiticisms when the object along the trial about the interest and the trial about the interest and the opinion that it will be calculated by any the state of the epiticism factor of the epiticism than the conclusion the interest and the trial about the interest and the trial about the factor than the state of the epiticism of the calculation of the cal

at the request of appellant, is defective because of an omission near its of se. Some of the refused of appellant, is defective because of an omission near its of se. Some of the refused instructions are sufficiently embodied in those which were given.

Forerel instructions, though otherwise correct, were improped because they emitted the visal gas tion whether the december had sufficient embal ergo city to transact the business had which he was also ensured. Other instructions were any extra refused. The didd subject will ensure the ensured were proper, he find to expectible error it she railings of the court upon the instructions on what ever it are

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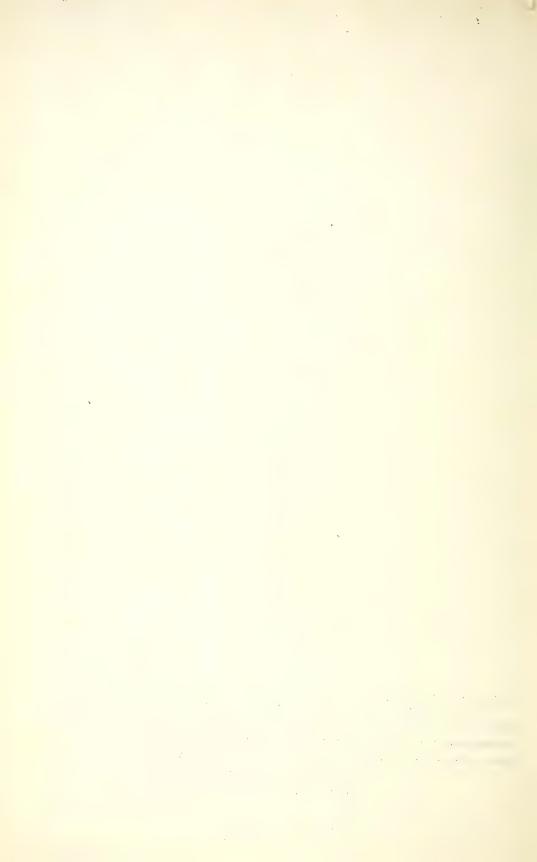
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 signed.

Nor the reasons above stated the judgment is reversel and the emes remained.



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STATE OF ILLINOIS, SECOND DISTRICT. SECOND DISTRICT. SECOND DISTRICT. STATE OF ILLINOIS, SECOND DISTRICT.
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day ofin the year of our Lord one
thousand nine hundred and
Clerk of the Appellate Court.



FILED

denoral delber 5000. October Term, A.D. 1911. Agenda Number 1

Vetional Jank Teninter Comming,

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Allia Jililan,

Defendant In Orror,

Trit of Trror to the Circuit Sourt of Tazewell County.

light in 'rror

Milimies, F.J.

200 I.A. 600

Court to the Circuit Court of Tagemell County for the purpose of avious Judgment in the 1 ther point a field in the favor of defendant in error reversed.

laintiff in error has filed a plea in this cause in this court which avers, in substance, that the judgment in the cirbeing me I the regular days of the abouting from in I g of the court; whit hid jud the is repleved to in action of replevin brought by defendant in error against the plaintiff in error; that the declaration also contained a count in trover and that the property sought to be replevied was not levied on under the writ of replevin; that said judgment was entered in favor of defendatt in error and against plaintiff in error for the sum of 200.80 and costs of suit; that on the same day on wh ch said judgment was entered plaintiff in error rayed and was remoted an appeal to this court conditioned upon the plaintiff in error filing his appeal bond in the penal sum of 500.00 with surety to be approved by the cl rk of raid circuit court; said a real bond, together with the bill of exceptions, to be filed in Lo days from the said day of 'arch, 1911;



that an appeal bond was duly filed by plaintiff in error on the first day of April, 1911, and was on the same day approved by the clerk of said court; that defendant at the ay term, A.D.1911, of this court, made its motion to have the judgment of the circuit court affirmed, together with damages, because said appeal had not been prosecuted nor an authenticated copy of the record filed in this court within the time required by law; that said judgment of said circuit court was, on the 17th day of June, A.D.1911, the same being one of the regular days of the Tay Term, A.D. 1911, of this court, affirmed by this court with 10 per cent, damages; that said "ay "erm, A. J. 1911, adjourned to court in course on the 20th day of June, 4.D. 1911; that no motion for rehearing was filed by the plaintiff in error in that appeal, nor was a certificate of importance prayed or by, nor allowed to, plaintiff in error, nor was leave given to take an appeal from said judgment of affirmance so entered by this court: that the 10 per cent.. damages so assessed against plaintiff in error by this court, , have been paid by him to defendant in error; that the pending petition for writ of error was not filed by the plaintiff in error until the 27th day of July, A.D. 1911, that said judgment of affirmence, so entered by this court at said Tay Term, A.D.1911, is still unreversed and in full force andeffect.

To this plaintiff in error has filed his replication which avers, in substance, that the said supposed judgment of affirmance was and is the only judgment of affirmance that was ever entered at any time in said cause, and was not a judgment of affirmance upon the merits of said cause; that



Mone of the records, nor any part thereof, nor any transcript of the record, or any part thereof, nor any of the merits whatever of said cause in the circuit court was on file with, or presented to, or before this court in any manner or form at or before the time of said Judgment of affirmance, and at no time prior to the 20th day of July, A.D. 1911; nor at any time prior to more than 20 days before the last day of the "ay Term, A.D. 1911; of this court was there a record, as is required by law, on file in the office of the clerk of the Sircuit court from which a true and complete transcript of the record in said above entitled cause could have been made, as required by law, to be filed in the office of the clerk of this court, or in any manner or form presented to this court, as required by law or by the rules of this court; nor was there any such record written up from the minutess or any other memorandum of either the trial judge or clerk of said circuit court and on file in the office of said circuit clerk, or at any place at any time prior to the 20th day of July, A.D. 1911, and that the lack of said record of said cause and the transcript thereof was not brought about by the procurement, consent or connivance of either the plaintiff in error or his said attorney, nor any one else at his or their instance, and that none of the merits of said cause was ever at any time or place presented thereof to this court for consideration until the suing out of the present writ of error; that the said judgment of affirmance by this court was an affirmance for want of prosecution only and not upon the merits, and that there was never at any time prior thereto any opportunity to present said merits of the said cause to said dou't, etc.



To this replication the defendant in error has demurred. The judgment of affirmance of this court upon the amount was that the judgment of said circuit court be affirmed in all things and stand in full force and effect notwithstanding the said ratters and things therein assigned for error. is no rule of law better settled than appeals and write of error to review judgments cannot be prosecuted by piece ... sal, and that when an appeal or writ of error is prosecuted the plement thereon is resadjudicate not only as to ll the errors assigned, but as to all the errors that might have been assigned. (Paldwin ve Penecy, 204 111. 281) And this is true whether the judgment was affirmed upon the merits or for other reasons. "Nor can the effect of a judgment as res adjudicata "be affected by showing that though an appeal was attempted to "be taken the judgment was affirmed without considering the 'cause on its merits, because of the absence of a sufficient "assignment of errors, or same other defect in the appellate "proceedings. ' I Presuan on Judgments, Fec. 249. question was very ably considered in the case of Calley ve : cople, 128 Ill. App. 76. Then the appeal bond was filed with the clerk of the circuit court and approved, the ampeal in this cause was perfected and the circuit court lost all jurisdiction over the same. Judgment in this court on that appeal affirmed the judgment of the Circuit Court, and an anomalous situation would be presented to hold that this court, having once affirmed the judgment of the circuit court upon an as eal, can again review the same judgment and reverse it upon a writ of The judgment of affirmance of this court on the aprell court, and cannot be varied, exclained or surported to be a final because of Circles the july and of the

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contradicted by parole. W.ST.L.& P.RY.CO.vs Feterson, 115

III. 597. In the case of Salley vs Feople, Supra, it was held:- "The effect of this writ of error, if sustained, "would be to cause us to review the same judgment, which "upon the former appeal we affirmed and directed that it "should stand in full force and effect, notwithstanding "the said watters and things assigned for error. It seems "to us clear that we have not the power to do this, and "that plaintiff in error edunot compel defendant in error "to defend the judgment of the court below twice in this "court under these circumstances."

The demurrer to the replication is sustained and the writ of error is therefore quashed at the costs of plaintiff in error.



Policy from A.D. 1915

Ag. 1

National Croation Society of the United States of America

Appellee

but on November 20, 1-12, he married appellee.

Vs.

Mary Pavlic Appellee
Jurs Pavlic
Veronika Pavlic Appellant

Appeal from Circuit Court Logan County

200 I.A. 601

ELDREDGE. P.J.

Bresimir Javlic was accidentally killed Jabruary 22,

1913. The deceased died without issue, leaving only his widow, .ary .avlic, aprellee. At the time of his death he held a certificate of life insurance for the sum of \$650.00 in the National Croation -ociety of the united States of America. This certificate was issued to him November 14, 1907, and the beneficiaries named therein were his father and mother, Jurs and Veronika Pavlic respectively. At this time he was living at Jerome Arizona. He subsequently left Jerome, sent to Ferrington, Illinois, and associated himself with the lodge of soid Society located at that place. Then he desarted from Jerome he left his certificate with the serome lodge, thousand the daid all dues and assessments levied by virtue thereof under the laws of said Society, and was at the time of his death a momber in good standing. At the time the certificate was issued to him he was unmarried; defend trian

On February 4, 1913, he wrote to the lodge at Jerome ask-



is to send his certificate because he wanted to change the beneficiaries therein; that he could not do so sithoug it and remove to that
it be sent to the lodge at fer ington, Illinois. On Johnson 19,1915
he wrote a letter to the Secretary of the lodge at the ington, Illinois
which contained the following instructions:-

"At the same time I beg you, dear Brother, to change the "beneficiaries to my wife, Marija. I do not have a certificate; it

"is somethere at Lodge 138, Jerome, Arizona. Therefore, write to two

"National Croation Society that it is there and let them find it".

The far as appears from the record the certificate was never sent to

thin, nor to the lodge at Farmington, and the change in the bone learner was never actually made in the certificate.

On August 18, 1913, appelles Mary Pavlic, widow of the insured, brought an action in assumptit against the acciety to recover the amount need in the certificate, and the acciety by leave of exart filed a bill of interpleader making Mary, Jurs and Veronica Pavlic parties defendant thereto. An affidavit of non-residence as to Jurs and Veronika Pavlic having been filed, notices of the number of the suit were duly published in a newspaper and mailed to Jurs and Veronika Pavlic at their place of residence, No. 7 Banovina Street, Lic, Croation County, Austria, in accordance with the statute.

On May 26 1914, the defendants to the bill of interpleaded Jurs and Verbnika Pavlic, having failed to enter an appearance or plead



chancery to take the proofs and report his conclusions as to the law and facts. On June 23, 1914, after the master had heard the proofs and announced his conclusions, the defaulants, Jura and Varonius, aviic, by their attorney in fact. Charles Pavlic, their son, and a brother of the deceased, entered their motion to vacate the order of default and reference and for leave to file and answer to the bill. This motion was over-ruled and a decree was entered directing the occept to any the amount of default to appelled, Mary Pavlic, From the decree Jura Coulty has appealed.

The decree is sought to be reversed on two grounds; first, that the Court erred in refusing to set aside the order of default and reference and to allow appellant to file and answer to the bill; and, second, that under the constitution of the cociety and the terms of the certificate the change in the beneficiaries was never consummated.

The motion to set aside the default was supported by an affidavit made by Charles Pavlic, as attorney in fact for Jurs and Veronida Pavlic, in which he stated that he learned of the institution of this sait by 20, 1916, when he waste to his parameta in regard therete and that they replied by letter directing him to engage an attorney to look after their interests, and that on June 15, 1814, he employed an attorney for that purpose.



On August 20, 1913, and tant, Jura . avice and executed a mer of attorney to said the clos savids authorizing the latter to represent him in all legal matters, to collect any money and take all necessary steps in regard to his decensed son, Arcainir Pavlic, to represent him before any court or outside of court, to start any kind of proceedings, to accept suamous, to take any verbal or written stions, to useist from actions, to make settlements, to accept and to lawfully receipt for all money or moneys , and to perform everything whatsoever that might be necessary according to his opinion. Thus, on the Seth day of ay roid, the time onen therles rastic at tend in his officerit that he first heard of the institution of this suit, he had had this lower of attorney fr ap allast for mearly nine months. Inder it he had apple authority to enter the appearance of appellant and anser the bill. The asfault was not token until bay 26, a week ofter as and learned of the institution of the sait, but he saited until June 23, over a month after he had knowledge of the alit before he took any stead in court to represent the interests of the appellant, Appellant himself ande no offidevit denying that he had received the notice mailed to amm by the clark. affidavit was not sufficient either to show that appellant did not

The affidavit was not sufficient either to show that appellant did not receive the notice walled in accordance with law, or that his attorney in fact acted with diligence.

However, from the view we take of this case appellant has



the insured for hearly three weeks prior to his beath and been deing all he could do to use his Me made the baneficiary in his continients.

The only section of the costitution government the change in hearficiaries

is as follows;

"CHANGE OF BELLEBEY"

A member may change his beneficiary to whom he has willed "his death benefit. He can change same by a written notice or testament sale in a legal anner approved by a notary Public or other competent "nathority and duly signed by the Lub-Asse bly's President and Recording "Secretary and stamped with the seal of the Sub-Assmbly.

Testaments or written notices of change in death benefits

*shall not be noticed if not put in the energy book and on the certificates

The only part of this provision that is of much weight is the first sentence. What little meaning may attach to what follows can certainly be but directory no not andstory. The constitution gave him the right to change the beneficiary. He did everything as about do to take the change and se think the devree is right in helding that, in low, such change had been made. Fraternal Tribunes vs Teutsch. 170 Ill.App.47.

The decree will be affirmed.



(1874)

Lengral Number 6343 April Term A.D. 191

enda Humber 4

The People of the State of Illinois, Defendant in Error

Charles D. Johnson

Plaintiff in Great

Delean County.

Writ of Error to the

200 I.A. 603

وبنواد وبالكلاب لايديد

in violation of the statute in the City of Eldomington, the same being anti-saloun territory, under the net comply called the Incat Stion not entitled. " An Act to Provide for the Creation by Popular Vete of Anti-saloun Territory, within Shich the sale of Intoxicating Exquer and the icensing of such sale shall be Prohibited and For the Abolition by Like icens of Territory To Created. " in force July 1, 1907.

There is ample evidence that the sold a malt liquor contain-

ing various percentages of alcohol called "Temp Bres" it is samuetly contended that the wourt erred in siving certain instructions on behalf of thereople, which in substance told the jury that the worlds- "Intoxicating Exquor" Anclude all distilled, spirituous, vinous, fermented and malt

liquors, regardless of whether sold liquors would, as a cotter of fact,

flaintiff
produce into leation. The defendant in arror offered several motoculions.

produce into include. The defendant in error offered severn' vectorization

which were refused by the court, stating in substance, that the burden was

upon the prosecution to prove beyond all ressonable doubt that he sold

lacuor which was, in fact, intoxicating, and the refusal to give them is

iler august avern



Section 17 of the Statute provided: - "In all prosecutions under "this act, by indictment or otherwise, it shall not be necessary to state "the kind of A rdor old." The trute it alf defines interior limor in Section I, as follows: - " Intoxicating liquor shall include all distilled, spiritaous, vinous, fermented and malt licuors." That the legisleture had a right to declare malt liquor to be an intoxicating liquor irrespective of its intoxicating character is well extablished. Otate of soine /. Fredrickson, IoI e.37; State v Gunosa, 16 t.1. 401; Vo unwealth triebleman re State 130 ala. 122; State re O'Connell, 99 me. 6 v. Anthis, I2 Gray(Mass.) 29; Commonwealth v Breesford, 161 Mass. 61; dtate v. Gertrin Intersecting liques, 76 in. 243; tate v. Goods weth, an Youn. bb; Douglas v. State, Ind. App. 302. In the case of Com convenith V. Snow 133 Hass 575, it was held proper to refuse an instruction that the jury must find from the evidence that the layer beer sold was into icating more the statute declared that it should be considered such; and that there was no duty imposed on the State to prove that it was intoxicating. That the defendant was quilty of selling intoxicating liquor within the arming of

the statute there can be no question.

The judgment must therefore be affirmed.



General Number 6355

April Torm, A. D. 1915

Aconda Husber 10.

The Poorla of the State-of Illinois, Parend At in Error,

Michael Elliott and Otho Jerdinge,

Pl intiffs in Error.

ERROR TO THE

CIRCUIT COURT OF

200 TA 607

ELDREDGE? P. J.

We plaintiffs in error were convicted upon an indictment containing 71 counts, the first 70 of ion on apa the illar 1 and of interio ting the air in the Year of Dac tar, sails the say as anti-calcon territory, and the 71 t acent charged the hearing of a place above intualecting liquor objects contrary to the form of the at tate. Trial a a and by jury and cash of the linting in over are found juilty upon such count.

The Town of Decatur, by a vote of the people on the 7th. day of April 1.P.1718 became bry territory. The svidence for the people 9.0 9 conclusively that the defendants, who had been in the saloon business before the town became dry territory, continued to run their dram shop in the City of Decatur within said town openly for a long period of time thereafter. The defendants did not tentify themselves, nor offer any evidence, and made no defense whatever. The Court inposed the minimum fine and the minimum fail sentence under each count against each defendant, and it is ur and that the except puri ment is accorden.

remalty for violations of the act is fixed by statute, which this court has no



satherity to change.

judgment the Court ordered and adjudged, in substance, that the defendent, Otio Jannings, cake his fine unto the People of the State of Illinois, in the mum of \$20.00 on each of the first 70 counts, and that he make his fine unto the Pools of the State of Illinois in the sum of \$50.00 on the last, or 71st. count, of the said indictment; that he be confined in the common jail of Macon County for a period of ten days on each of the first 70 counts of said indictment; that he be confised in the common jail of Macon County for a period of 10 days on the last, or 71st count, of the said indictment; that the jail sentences imposed herein run consecutively making a total of 720 days in jail; that he stand committed until said fine and costs are fully paid, or until he shall be otherwise discharged according to law. Substantially the ame form of judgment was entered as to the defent t, mich mel Elliott. לב אל הבל היי אלי לווים ווים אורים ווים לא לווים ווים אורים ווים לא לווים אורים ווים אורים ווים לא לווים אורים אורים ווים אורים אור ierasi.

and the defendants I the court below, and a large amount of evidence was introduced on behalf of the Poople. There was no reversible error in the rulings of the trial court upon the decision of evidence, or upon the giving or relating of the instruction.

The Judgment is affirmed.



STATE OF ILLINOIS

APPELLATE COURT-THIRD DISTRICT

	2001	530 000	
AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at			
Springfield, on the FIRST TUESDAY in	OCTOBER	A. D. 19 <u>15</u>	
PRESENT			
HONORABLE EDGAR ELDREDG	Presiding Justice	2	
HONORABLE GEORGE W. THO	MPSON, Justice		
HONORABLE EMERY C. GRAV	ES, Justice		
Geo. L. Tipton Attest: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX		200 - 200 - 100 -	
BE IT REMEMBERED, that afterward, to-wit:	On the 13th	day of	
October, A. D. 19_15, there w	ras filed in the office of the said (Clerk of said Court,	
an opinion of said Court, in words and figures following	ng:		



Oct 13 1915

Geo. L. Tipton
Clerk
Appellate Court 3rd Dist.

6348; April Term, A.D.1915. Agenda Number 7. General Number 6349; 6350; 6351. The People of the State of Illinois, Defendant in Error, -VS-Adolph Schlick and Bernhart Kile, Plaintiffs in Error. The People of the State of Illinois, Defendant in Error,) -VS-George Schenk, Plaintiff in Error. WRITS OF ERROR The People of the State of Illinois,

Defendant in Error, TO CIRCUIT COURT -VS-OF MACON COUNTY. Charles Seibert and John Seibert,

Plaintiffs in Error.

The People of the State of Illinois,

Defendant in Error,

-VS-

Anthony Shearer and Harry Meisenhelter, Plaintiffs in Error.

ELDREDGE. P.J.



These are writs of error to the Circuit Court of Macon County to reverse judgments of conviction against the plaintiffs in error on indictments under the state law for violations of the act known as the Local Option Law, in force July 1, 1907. By agreement of the parties all the writs of error were consolidated in this court. Trial by jury was waived in all the cases and they were tried by the Court on agreed stipulations of fact. The stipulations of fact in these cases are identically the same as those which appear in the case of the City of Decatur vs Adolph Schlick, et al, 269 Ill. 181 page, with the exception that in the latter case the judgments appealed from were obtained by prosecutions brought under a city ordinance of the City of Decatur, while the judgments from which the writs of error were prosecuted from this court were obtained by prosecutions under the statute. The above case is referred to for these stipulations.

The only question involved in these writs of error is whether the several defendants in error were guilty of violating said act by means of shifts and devices. The Supreme Court upon the same facts having decided this question in the affirmative, it must be considered as res adjudicata in this court, and the judgments are therefore affirmed.



General Number 6359. April Term, A.D.1915. Agenda Number 13.

George P. Van Cleave,

Appellant,

-VS-

P. H. Fitzsimmons and Katie E. Knox,

Appellees.

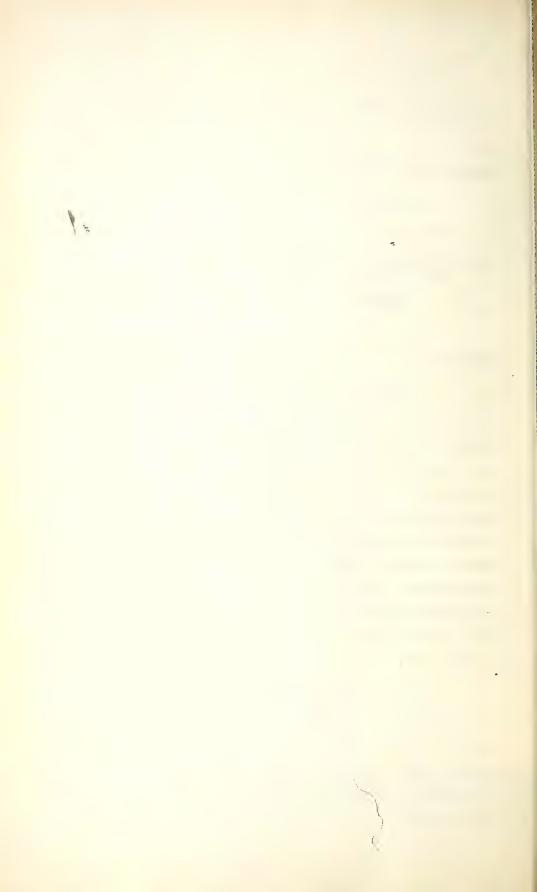
APPUAL from the County court of Macon County.

200 LA 609

EDDREDGE, F.J.

In vacation after the December Term, A.D.1911, of the County Court of County, appellant took judgment by confession against appelless, on two promissory notes for the sum of 531.20, together with costs of suit. At the December leme defendant was opened up, and they were liven leave to plead. They filed a plea of non-assumpsit, and appelless, the judgment was overruled, and he elected to abide by his demurrer; where-upon final judgment was entered in favor of appelless. The only judgment was entered in favor of appelless. The only judgment was entered in favor of appelless.

ed promissory notes in said declaration mentioned, were for the pament of interest at a greater rate of interest than is allowed by law; that they were not taken nor received by the plaintiff in the usual course of trade, and that the plaintiff at the time hereceived the said notes under the endorsement



thereof to him, well knew the consideration of the making, executing and delivering of said notes.

usury is alleged in this plea in general terms only, and the aver ats are but mere conclusions of the pleaders. It is not sufficient to plead in general terms that a transaction is usurious, but the facts constituting the usury aust be set forth. Stanley vs. Trust & Savings Bank, 165 III. 295.

The court erred in overruling the demurrer in this plea.

The judgment will therefore be reversed and the cause remanded with directions to sustain the demurrer to the plea.



General Number 6365. April Term. A.D. 1915. Agenda Number 19.

The People of the State of Illinois.

Appellee,

Appeal from County Court,

Jersey County.

75.

William Coleman, Jr.

Appellant.

The Wilds, F.J.

200 LA 610

This is an appeal from the judgment of the County
Court of Screey County rendered on the verdict of the jury
finding that appellant one the father of the bustard child of
Ora Tucker.

On August 26, 1914, Ora Tucker filed her complaint before the justice of the peace charging, " that on or about the -----day of April, 1914, the crime of bastardy was committed in said county, and named appellant as guilty of said crime." Hocomplaint is made us to the form of the complaint, and no or or is assigned thereon. The child was bern ctober 21, 1914, and the prosecutrix testified that the acts of intercourse which caused her condition took place on the evening that she attendollant at the Wodern Woodmen Wall in the town ed a show with an of lidelity, which was on the last ednesday in January, 1914, and also on the following Sunday evening. Appellant admitted in his testimony to having had many acts of intercourse with the prosecutrix, but that she having positively testified as to the particular dates when such acts took place which caused her condition that she must prove those acts as of such particulor dates, and as the preponderance of the evidence shows that



he was not with her in Fidelity at those times the verdict contrary to the evidence. To do apt construe her evidence as showing a positive assertion that the acts took place on the last ednesday in anuary and the following unday, but rather that they took place at a time when she went with appellant to a show that was given in the Wodern Woodman Hall during the month of January, 1914, and on the Kunday following that time. or do we think that the preponderance of the evidence shows that anpellant was not with her on those occasions. The prosecutrix corroborated in her testinony in this Assert, y several witnesses who are at least as disinterested as those who testified recampeding of fact for the jury to determine with whom we the reject of the evidence. he inture of the proceeding was to determine whether a hellant was the futher of the child, and it was in aterial on that particular day the ects of intercoupte look place, if, in fact, a wallant and the father of the ghild. Wolcomb v. Teople, 78 111. 409.

that the acts of intercourse took place in April, 1914, and as the prosecutrix testified on the trial that they were conditional and in January, 1914, and in the sufficient of any first procuring evidence to contradict her testimony, and in support of the motion for a new trial affidavits were filed by several officers of the Fidelity Camp of the Modern Woodmen for the effect that no entertainment of any kind was given in the Wodern Woodmen Hall on behalf of the Modern Woodman on the evining of the last Wednesday in January, 1914, and one affidavit stated that no entertainment of any kind was given on be all of said open in each hall on any night Muring



Decatur vs Adopph Schlick, et al, --- Ill. ---- Fage, with the exception that in the latter case the judgments appealed from were obtained by procedutions brought under a city ordinance of the city of Decatur, while the judgments from which the writs of error were prosecuted from this court were obtained by prosecutions under the statute. The above case is referred to for these stipulations.

The only question involved in these writs of error be whether the several defendants in error were guilty of violating said act by means of shifts and devices. The fuprame court upon the same facts having decided this question in the affirmative, it must be considered as rea adjudicata in this court, and the judgments are therefore affirmed.



said month of January. But it appears that said hall was also used by a society known as the Royal Reighbors of America, and the same of the off of the off the original transfer of the original of th tertaigment are riven in the opdien ball on behalf of enid City of grant of the state of t Lednesday in James, the affidavit deed not state, and no affidavit was filed, stating that there was not in fact an entertainment given on behalf of the Royal Beighbors of America in said hall, or one given und r come other auspices, on some night during the mouth of denuary. We affidavlye were not sulfacient to show that there was not entertainment of some ind Acen in said hall during said south. X appellant admits having had may acts of intercourse with the warmentels, and the only conflict in the evidence is as to the the mon they took place, which is i material, An d as there is no evidence of any/ough ofte having here obesitted by her with ank other on during the nervol of restation, we cannot half that the growin do not a cousin the consistant.

The judgment of the Sounty Court is affirmed.



General Number 6348 6349 5550 April Term, A.D.1915

Agenda Number 7.

6351.

The People of the State of Illinois, Defendant in Brror.

VS/

Adopph Schlick and Sernhart Kile.
Plaintiffs in Error.

The People of the State of Illinois,
Defendant in Error.

VS

George Schenk,

Plaintiff in Fror.

VS

The People of the State of Illinois, fendant in Error,

VS

Charles Seibert and John Feibert, Plaintiffs in Error.

The People of the State of Illinois, Defendant in Error,

VS

Anthony Thearer and Marry Meisenhelter, Plaintiffs in Error.

ELDREDGE, P.J.

These are writs of error to the Circuit Court of Encon

County to reverse judgments of conviction acainst the plaintiffs

in error on indictments under the state law for violations of

the act known as the Local Option Law, in force July, 1, 1907.

By agreement of the parties all the writs of error were consolidated in this court. Trial by jury was waived in all the cases

and they were tried by the court on agreed stipulations of

fact. The stipulations of fact is these cases and indentically

RITS OF ERROR

TO

CIRCUIT COURT

OF HACON COUNTY.



FILED

Gen. No. 6374.

April Torm, A.D. 1915,

Age: da Number 28.

The People, ox red Sam D. Price, Ap ellee,

-48-

C.A. Askins;

Appellant

Appeal from Circuit Court Shelby County.

200 I.A. 621

TLETTOOR, P. J.

7 is is an action of mand one

the had not been as school treasurer of towns in 10, reces 3, East of the Third P.M. in Shelby County, Illinois. It appears from the reserved that the instance of his as coldinated the arm. At this is a constant of the arms. At this is a constant of the arms of

Tructions of Schools of Torochip Ten (10) Range Tirec (3) cat at No. 6 School, mistrict No. 47, directly after the election of tructory, and proceeded to organize by electing H.M. Archey, president of the board of Tructors.

S.A.D. Howe nominated C.A. Askins for trescurer of the heard for the ensuing term.

J.F. Banning newinated Sam D. Prico.

H.M. Archey decided the nominat: by favoring Sam. D. Price for treasurer for the coming term."

restrict The record of this meeting reservition up by



Sam D. Price, was not at the meeting of the Board, but upon being notified subsequently of his election as treasurer, executed a bond in proper form, which was approved by each member of the Board, and delivered it to the County Superintendent of Schools who endorsed thereon. "Received, Approved and filed in my office May 4, 1914.

Lee W. Frazer, County Superintendent, "Thereafter the relator made a written domand upon appearant to turn over to him the achool funds, hooks and properties as treasurer of said school district. This appearant refused to do, and on a trial before the source in the properties.

The horal te timeny we have in the trial court, the trial court only a mideral a tent evidence it is unnecessary to see upon the meeti o relect in result thereto if there is deficient as atom evidence in the restrict to sectain the judgment of the court. Much of this evidence new complained of by appellant was of the same character and to the same effect as that letromend by sincell. He propositions of law sure premanted to be trial court to paragram.

The principal contention of a

first, that the record of the meeting does not show that the relator
was elected treasurer; second, that the record of the meeting not having
been signed by the president and clerk of the Fourd of Trustees, it was
not authenticated and should not have been received in evidence; and, third,
that there was no proper approval of the bond of the relator by the County

Superintendent of Schools.

The remord of the proceedings was written up by the appellant and he cannot now complain of the form. In our opinion it sufficiently shows the electin of the relator as treasurer. It is insisted, however, that the provisions of the statute directing that the minutes of each reating be signed by the president and clerk is mandatory, and a they are not so should be related to relate as the section of the related as the section of the nature.

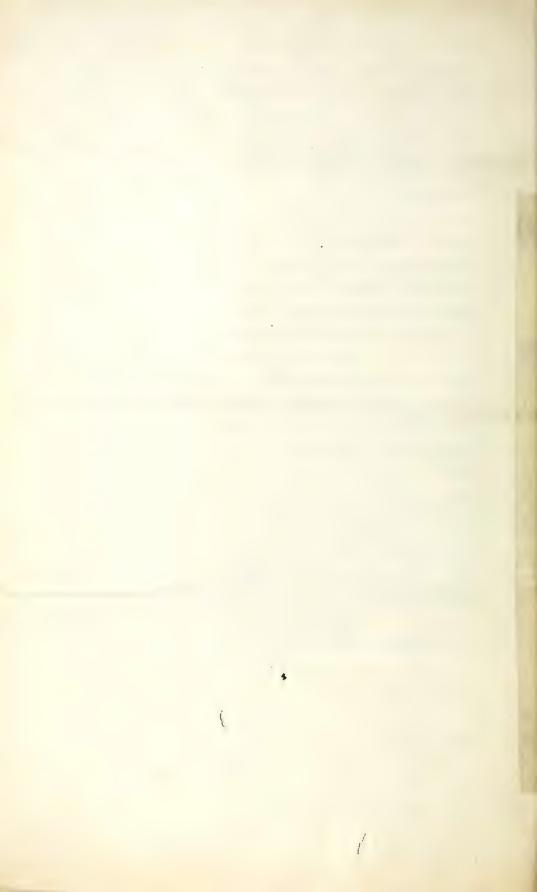
oney



is mandatory, then it become the duty of appellant, as clark, to sign the record himself as such, and he cannot defeat the right of is successor in office by his own wilful misconduct. The attitude of appellant in his brief and argument seems to be that he has some vested right to this office. School trustees have the power to appoint a township treasurer for the term of two years, and to remove him for good and sufficient cause; and this power of removal requires no formal charge, no notice to the incumbent, no form of procedure, and is not subject to review. Hertel ve. Reismanue, 229 Ill. 474. The bond was approved and accepted by each of the trustees by endorsement thereon in themanner approved by the statues, Holbrook vs Trustees, 22 Ill. 539; Bartlett vs. Board of Education, 59 Ill. 364, as it we also by the county superintendent.

The fact that the County Superintendent did not give relator a written certificate that he was such treasurer cannot affect relator's right threto. The bend was in proper form, approved and accepted by the trustees, and it was the duty of the County superintendent to receive, approve, file and record the same and give relator his certificate of office. Hertal ve. Telemenus, supra. The relator is prize facts the school district, and his title to the office cannot be tried in an action of mandague. Hertal ve. Boismenus, supra; State v. Johnson, 15 Fla. 2; State v. Outon, 26 Fig. 634; State vs. Statevood, 15 Minn. 221; State v. Outon, 26 Fig. Warner v. Myers, 3 Ore. 218; 19 A. & E. Ency. Law, 70(.

We can see no parit in the extentions made by appollant, and the judgment will be affirmed.



OT TALL SUMMER STATE

ADDAL . A. D. I IL

Arres Buller 31.

We To The My,

Angelles,

00 😲 NO

STATE BINK OF LATERAL

Appellant.

Arreal from

Circuit Court

Logis County.

ELDREDGE, P. J.

200 I.A. 624

round in the latter's bak.

Plaintif The for several years had been a tonnet on fare land near Lathan, Illinois, which was controlled by one Court J. Luche and had become indesting to said Lucas, for which indobtedness he had given three promittory notes. Two of these notes were for the principal sam of \$2000.00 each, and one of them had a cradit on it of \$200.00. The third note one for the principal sum of about \$450.00, which, at the time of the transaction in centreversy, a s part suc and on which, together with the Council ted intermet, there are due \$529.31. Appall one also injebted to the fack, oridonced by a provincery note, on which was due, including the accumulated interest, 2277. To. In order to pay off some of this incolte mess appelled hald a sale on the 'am' and requested Mr. Walter Volle, enshier of the bunk, to not us clerk at the cale to lack after the process, and, according to the testiscopy of Volle, total him to first him not of the processing of the cole the amount due on his note to the bank, and turn the balance over to Mr. Lucse. On the ay after the sele Mr. Lucse and expelled out to the book to make an application of the proceeds of the sale. The total amount of the procools of the sale was 1955. 18. roto to the bank, with the accumul ted interest, amounted to \$279.80. The bank purchased the act so given at the plaintiff at a discount of \$28.00, making too total amount due the bunk at that time from topolice, the sum of 2307.83. The beliance of the proceeds of the sale, amounting to \$657.38, san asposited by Wolle in the bank to Topic



end the proceeds derived from such property mounted to \$55.23, and this smount was checked out by to the parties to make it belonged, is wing the amount in controversy \$571.15.

Then expelled and bucks came to the bank on the day following the cale, they went into a back room for the currene of carrying on their negotiations. After this conference the bank executed the following paper:-" Land., Ill. Feb. 11, 1914. "No.---- State Bank of Lathan, 76-1806. Pay to O. J. Lucas, " or order, \$571.15. Five Handred and Seventy-one and 15-100 "Dollars. Charge T. S. Richey." This was endorsed on the back by O. J. Lucas, and otamped raid by the State Bank of Lathan, Illineis, February 12, 1314.

Towards the latter part of March or the first part of April, appelled had an overdraft at the bank of \$40.00 which he paid. On the 7th day of July, 1914, Luces took judgment by confession on the two \$2,000.00 notes for the sum of \$4,041.00. Ont one of the notes were the andorsecents:- "Paid August 30, 1913. "Two Hundred Bollers. Paid Fobrary 11, 1914 Forty-one 84-100 "Bollars." On July 10, 1914, Lucas and applies made a written agreement wherein Lucas agreed to satisfy said judgment of \$4,041.00 is consideration that appelled deliver to him one gray here, and the undivided one-half interest in 120 acros of corn, which straight agreed to buck and deliver at the elevator in Lathan. The judgment was to erefore satisfied of record, by Lucas. It was not until after this judgment was antiefied of record that the the bank that it had wrongfully paid the amount in controversy to Lucae, and did not bring suit to recov r the same until September 21. The above facts moall undicruted, and the basis of this out for the recovery of this mount from the bank in the claim by depolice that he never authorized the bank to pay the \$571.15 to Buchs. is denied that no ever told Volls to may may part

of the proceeds of male nuls to Luc a.

or the form the principle of the state of the same relative of the same



cross examination was pared the following question: " You ouse the sand there some money that was taken out of the sale money, did you not?" To this an c. jection as sast in d. We think this postion and out inly count it being part of the res gastes. On cross examination he was also asked if he did not tell Mr. J. H. Miller that all the proceeds of the sale were to be paid or turned ever to Lucas, to mich an objection an Eustaine. This is tion to corretant as tending to correlerate the aithese Vollat it applies other in him to turn over such proceeds. Further, on cross examination he was asked if he did not tell Volle on the morning of the sale that all the proceeds of the sale were to be turned over to Lucas as a credit on what he owed him . To this also on objection was sustained. This was ion was clarily proper under the issues in this case. Also, on cross examination - olis us remed if Mr. Lucas did not turn over to him at the time of his conference with him in the bank after the sale, the small note of (450, 0, to which the sitness and aret It was the contention of app eliant on the tri I that at the recting in question between Lucas and Plantite that the former turned over to appear the \$450.00 note, and that out of the balance that are due appointed out of the proceeds of the sale there was \$41.84 left, which Lucas endorsed upon one of the \$2,000.00 notes, and every circumstance in the cost tends to the that these goro the true facts and to corroborate Volle in him obstances that wrolles told him to y these proceeds to buc so-It = undisputed that the \$41.84 a andorsed as paid upon one of the \$2,000.00 notes, as heretofore shown. There it com from al her we this weent private it, if it was not in record to with the facts and toctification or stampted to be testificate; But of Turther, on cross examination counsel for sprolling asked smalls if he did not owe Lucas a note about that time for about the sum of \$450.00. this question also an objection was sustained. He was further asked if he didn't know what notes Lucas held against him, to which an objection was sustained. These que tions to mil weather a time chijestions to them should a we Space will not make it in to ilscuss all the allocateriors in sustaining objections in the direct was instinued volls. To will may, our Fully, test his direct or minution one alto star too such restricted. The entire testimony of the witness Lucus was stricken but of the record for ...



item follow about the conversations had nature his and fluid about sprelled sale and about the proceeds of his cole incofar as it pertained to any authorization to make payment of any portion of the proceeds to Lucas.

Witness Volle testified that when he and a mot in the bank on the day after the cale he delivered to the \$450.00 note and gave nim credit for the balance of the proceeds amounting to \$41.84 on one of the \$2,000.00 notes, and me is parroused to the 1.000. note on with this or it seems. It is undisputed that when that bank had turned over the balance of these proceeds to Lucae for months before he made any claim for the same and even paid an overdraft of \$40.00 on his account after the same had been done, and the facts tome strongly to show the tower if appelled of mot work thy utbills this bank to turn over the believe of the processle to his act, the fit regress tills ite relies to so dorre. If the testicony of the itage : , Volta and Lucas, limited as it was, had not been erroneously excluded, it would be our duty to reverse this judgment on the ground that it is contrary to the clear and manifest weight of the evidence.

What we have said practically disposes of the various objections made to the instructions. The judgment is reversed and cause remanded.



Central Number 6382. April Term, A.D.1915. Agenda Number 54.

Appellee,

VS.

The Hartford Fire Insurance Company, a corporation,

ippollant.

Eldredge, P.J.

Appeal from Circuit Court Vermilion County.

20012 6 026

This is an action of assumpsit to recover upon a parole agreement to renew a fire insurance policy at the time of its expiration. This case was before us on a former appeal and is reported in 188 Ill. App. 181. The evidence in the record on this appeal is substantially the same as it was in that on the former appeal. We held on the former appeal that as the original declaration did not over the ownership of the property in appellee, nor that he had any insurable in crest thereir the giving of the two instructions which stated, in substance, that if the jury believed from the evidence that all the allegations contained in plaintiff's deelaration were true then its verdirt must be for the laintiff, vere erroneous, as peremptory instructions must include every elament necessary to recovery. After the case had been evered and remanded, and reinstated in the trial court, appellee filed an additional count which contained substantially the same allegations as the original count except that instead of morely averring that appellant agreed with appellee to renew the policy, it was further alleged that defendent acreed with



plaintiff to renew the policy for his benefit and in his favor", and with the further exception of an additional averment, " that at said time, and at the time of the loss of the policy, the plaintiff of was the owner of the same." Many q uestions raised on the former appeal are again presented, but as to such our former opinion is res adjuticate. The only new question on this appeal requiring consideration is the contention that as the policy contained a provision that no action to recover upon the policy shall be sustainable unless commenced within one year from the time of the loss, and as the additional count stated a new cause of action and was filed more that one year after the loss, appelled is barred from any recovery thereunder. The answer to this isthat this suit was not brought to recover upon the policy, but upon a contract to renew the same.

There being no reversible error in the record, the judgment is affirmed.



General Number 6391. April .e m, J.D. 1916. Agenda Number 3.

Chas. Johnson Hardware Co.,

Appellant,

vs.

Board of Fducation of School District No. 96, Fulton County, Illinois,

Appellee.

...pheal from Circuit Court Fulton County.

200 TA 638

Fldredge, P.J.

Appellant filed its bill in the Circuit Court of Tulton (ounty to establish a mechanic's lien as a sub-contractor on the money due or to become due the contractor for the construction of a public school building in the City f Cuba, Fulton County. W.H.Gard, the contractor, was defaulted, but the Board of Education filed its answer, which, among other things, sonied that said Board ever received any written notice of appellant's claim. Upon a replication being filed to the answer, the cause was ref rred to the laster in Chancery, who found, among other things, as follows:-"SIXTERNIH - I therefore hold that the account of the Johnson "Hardware Company against the said W.H. Gard which was de-"livered to the said J.O.Applebee, president of said Board "of Fducation on the 10th day of November, 1913, was not "sufficient in substance and form as required by the statutes "of the State of Illinois, to create a lien on said funds then "remaining in the hands of said Board of Iducation." Uron a hearing before the Court upon appellant's exceptions to this finding, the same were overruled and the bill was dismissed for want of equity. The bill is based upon Sec. 23 of the Mechanic's Lien Act, which, in part, is as follows:-it Any



"machinery, or labor to any contractor for a public improve"machinery, or labor to any contractor for a public improve"ment in this state, shall have a lien on the money, bonds,

" or warrants due or to become due such contractor for such

"improvement; Provided, such person shall, before payment or

"delivery thereof is made to such contractor, notify the

"officials of the state, county, township, city or municipality

"whose duty it is to pay such contractor of his claim by a writ
"ten notice."

The written notice of appellant's claim delivered by him to the President of the Board is as follows:-

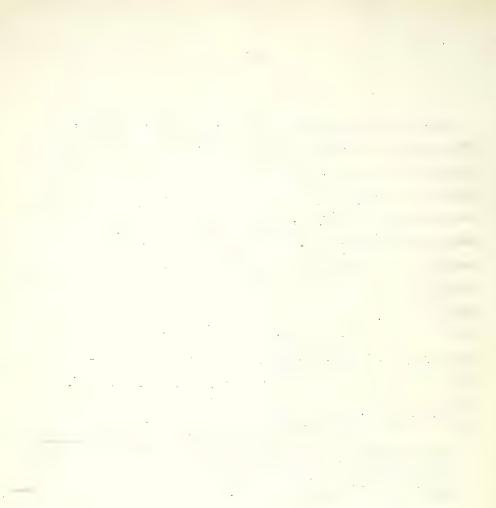
"Mr. W.H.Gard,
Bought of Chas. Johnson Hardware Co.,

2023 South Adams Street,

Lanufactures of Dealers in Calvanized Iron Sornice,
Tin, Hard Stoves, Fu Sea, Ware and Slate Foofing, and house
Furnishing Goods, Builder's Hardware, Carpenters' and Coopers'
Tools, Belting, Packing, Steam Hose, Steam and Not Later Heating,
Tin, Copper and Sheet Iron Tork.

Nov. 1, Contract Job, Roofing, Galvd. Iron and Tin
Work and Sky-lights on Cuba SchoolsCr. Sept. 15, By Cash500.00 660.00

The question for determination in this case is whether the above is such a written notice of appellants' claim as is contemplated by Sec. 23. While it is true that said section does not provide for any form of such notice, yet mechanic's lien laws must receive strict construction. In our ppinion this alleged notice is wholly insufficient. The statute provides that before any person can establish such a lien he shall notify the officials of the municipality, whose duty it is to pay such contractor, of his claims by a written notice. The notice in this case does not claim any lien on any unpaid funds, does what not show/materials were furnished to the contractor, and



does not even state that they were furnished to the contractor for the purpose of being used by him under his contract in the construction of the school building. There is nothing in the notice that can in any way apprise the owner that appellant claims a lien upon the unpaid funds under the contract with Gard, or that he furnished any materials to the contractor under his contract for the construction of the building. From the reasoning in analogous cases we must hold that this notice is insufficient under Sec. 23 upon which to establish a lien. Lacrosse Lumber Co. vs. Grace M.F. Church, 180 Ill. App. 587; Germania Life Ins. Company vs. Elewer, 27 Ill. App. 589; Davis vs. Rittenhouse & Embree Co. 92 Ill App. 541; Watenkamp vs. Billigh, 27 Ill. App. 585.

The decree of the Circuit Court will be affirmed.



1907

GPM PAL MITTER -6399

April Tora, A. D. 1915

Agonda Humber 46.

CONCERCATION OF THAI ABRAHAM,

a corporation, Appollant,

- vo
RAPAN KARREN,

from to the

200 I.A. 640

ELDREDGE, P. J.

Appellant brought its action in assumpeit against appelles to recover upon the following written instrument executed by her: To Pobruary 13, 1914.

"I, Sarah Kanner, in consideration of my love and fond nemory of my
"late husband, Isadore Kanner, and in further consideration of the funeral rites
"performed and to be performed upon my said late husband, hereby promise to pay
"the present encusbrance upon this congregation, Bnai A raham, at Seventh and
"Mason Streets, amounting to \$1,900.00 within six months from date, I nevery further
"empower the trustees of the said congregation to enforce my said provide.

"Sarah Kameer.

n ithough

Appollant appoals from the judgment of the Circuit Court sustaining a general and special desurrer of appelled to the second asonded declaration, which consists of two counts. The first count avers that the plaintiff is a religious organization, organized under the lase of the State of Illine is and was the owner and possessed of cortain real estate located at the couth east corner of Mason and Seventh etrects in the City of Springfield, and there carried on a place of worship in accordance with the doctrines of said church, and then and there had trustees who were duly elected by said congregation; that one Isadore Kanner, late Bushand of appelles, in his lifetime, was a comber of said congregation; that on the 33md day of February, 1914, appelles executed and delivered to it the document hereinahove sentioned by which said promise in writing appellee then and there una rtook and promised to pay to appellant, or to its bunefit, or to its mortgagese, or debtors, the sum of \$1,900.00 within six months from the date thereof for the and hensit of the appollant compregation; that at the time of aking said promise in critical appollant was inderted to the First Trust & Carings Bank of the City of Spring is ld in the ... I 31,900.00, which said indebtodness was then secured by a certain



mortgage deed executed by appellant through its trustees; that desand had been made upon appellant for the payment of said sum of memy by said bank and that said trustees had been required to pay out additional meney to prevent foreclosure of the same; that appollant has requested the payment of waid sum of \$1,900.00 from appellee by its trustees, and that appellee sither may the many to long bank or to my fline for the pure of diquidating mortgage; lut that appelled has refused so to do, etc. The accord count is substantially the same with the addition of the further averagnts that the funeral rites specified were performed upon the said Isadoro Kamser, his band of appelloe, after the making of said written instrument and in consideration thereof; that appelles know of the existence of said mortgage lien upon the said real outate at the time the executed eald promise in writing, and has lince known that the same is unpaid and who the mortgage was: that appelled did not pay said bank within six months from the date of said written promise said in, thereby and by means whereof appelles because liable to pay appollant the sum of \$1,900.00, and being so liable then and there undertook and promised to pay appollant when therounto requested, the said sum of \$1,900.00, that appellant requested appelles to pay said trustees said sum to be used to liquidate said indebtedness; yet appelled refused, and still does refuse, to pay appellant, or its trustees, or to said bank, said aum, etc.

The instrument itself does not purport to be a promise by anybody to anybody except by the maker thereof to herself. In our opinion it is a sore maked written personal pladge unsupported by any valid consideration thatever, and one which appelled may carry out or not as she sees fit.

The judgment is affirmed.



Seneral Number 6404. April Torm, A.D. 1915. Agenda humber by

G WALTE CLEE,

Appellee,

C.C.C. SS. IA BY. CO..

ws

A ellant.

Appeal from

County Court

Idgar County.

200 I.A. 641

ELDEDOS, P. J.

Appellant appeals from a judgment for the sum of 175.00 rendered against it in anaction on the case in favor of appellee for the failure to furnish proper and sufficient cars for the transportation of hogs from faris, Illinois, to last Cambridge, Eassachusetts. The case was tried upon the third and fourth counts of the declaration, which are substantially the same, and aver that on the 10th day of December, 1913, appellant received from appellee a larve number of hogs to be carried by it from the city of faris to East Cambridge; that it then and there became the duty of appellant to furnish proper and sufficient cars for the transportation of said hogs, and on account of hits failure so to do appellee was compelled to and did ship said hogs to Indianapolis, Indiana, whereby they became greatly damaged and lessened in value.

placety to furnish double deck care for these man, at the placety flacety as unable to procure double docks care, but ild furnish single deck cars. It is not appear that a clieb made any protest upon the character of the care but accepted the



Planety erue and chipsed oir home to Indianapolie. fied upon direct examination that he ordered the cars for the purpose of shipping the mage to "ast Cambridge, but on cross exemination he stated that he was not sure whether he ordered the cars in order to make the shipment to Cast Cambridge or to West Buffalo. Mey York. The records of and class of that his order was for cars in which to ship the hogs to Bust Buffalo, New York. The evidence show that one carload of hogs was sold in Indianapolis at 39.50, and the second load at B.Ok our hunderd nounds. Carther tentified to it just before he made the shipments that he had telegrams from the J.F. Squire Company, pork packers at Wast Cambridge, that the price f r top hogs at that place was 11.50 per hundred pounds dressed for pork. He also testified that the cost of shipping the hogs to "ast Cambridge would be about '2.50 or '2.60 per hundred, and that the freight rate was 32% cents per hundred. A few of the hogs were sold to local marties at Paris, Illinois, for 18.50 per hundred pounds. There 4 evidence as to what the hoge weighed at Indianapolis, or whether the price received for them there was for live hoge or for hogs dressed for pork. There. no evidence of the number or weight of the hogs sold at Faris. evicence of any kind in regard to a shipment of hoge to East Buffalo, New York. There is no evidence that the cars furnished were not proper and suitable for the shipsent of the hors to the ameridge excent to t of lee to the witness stand as his own witness, and he testified that the cars he shipped the hoge in were ordinary 40 foot stock cars, and that he made no complaint of the character of the card. On cross examination, over objection of appellant, he was permitted to testify that the cars he used in the shipment of the noge to Indianapolis were not such as are ordinarily and usually used by well



regulated railroad commanies for the transportation of live stock for such a distance as from Paris to Tast Combridge; also that double deck cars with water troughs in them were such as are usually and ordinarily provided by well regulated railroad companies for the transportation of live ctack between said points. This cross examination was ithroper, as appellee was asked nothing in his direct examination in regard to thee matters. The evidence is uncontradicted that double deck stock cars are not in general owned by railroad companies themselves, and that appellant owned no such cars; that the double deck stock cars are owned by special transportation companies and are leased to the railroad companies as their demands may require; the reason for this being that railroad companies cannot afford to keep on hand at all times special prticular kinds of cars such as refrigerator cars, palace stock cars, cars for the transportation of meats, dining cars, parlor, sars, sleeping cars, etc., and that the business of one railroad company in one part of the country in certain seasons of the year demand a large number of these various kinds of cars, while other railroad companies in other parts of the country in other seasons of the year demand very few of them; consequently, most of these special kinds of cars are owned by various different companies who lease the came to the railroad companies as their demands may require. It is undisputed in the evidence th at appellant made efforts to procure double deck care for appellee, but was unsuccessful in getting them.

From the state of the evidence in tis record we must hold, first, that there is no evidence which a jury could estimate any damages; and , should, that takers was no competent evidence that appellant failed to furnish proper and suitable



eare for the chirant of hid horn.

The judament is therefore reversed and the same remarked.



HARLEY J. WHIPE,

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WENTER BUTCH,

Aspallant.

Circuit Court
Helean County,

200 I.A. 643

ELDNEICE, P. J.

Appelles recovered a judgment in a forcible entry and detainer proceeding against appellant for the possession of certain premises known as 502 South Bright street in the City of Moomington. The evidence shows that appellant refused to pay the rent unser the lease and was using the same for issueral purposes.

The principal contention made in this court is that the trial court error in overruling appellant's motion to dismise the There is no smit for mant of a written complaint on file / Managemental bill of exceptions on this motion.

**Property in the property of the Peace, and if the written complaint was found to be missing from the files and but been lost or destroyed, upon the proof having been made thereof a copy could have been substituted therefor. There delay no bill of amosptions on this motion, it will be presumed that the court properly suled thereon. Shachan v. Richardson, 147 Itl. 360.

The juigeout of the Circuit Court is affirmed.



Appeal from Circuit Court. Christian County. F. JOHRSON. Aspellan 200 I.A. 644 HIDNELGE, P. J. Appellees are partners engaged in the abstract and real estate business in the City of Louisville, Clay County. They recovered a judgment in the sure of \$575.00 against appellant for commissions for consummating thesale of a 240 acre truct of land. The question involved is principally one of fact as to what was the contract. Appellant claimed to own 502 acres of land in Clay County, which was divided into

two tracts, one containing 240 and the other 262 acres. The nerotiations between the parties becam by appellant requesting appellees to sell the 50 x acres for him at a net price of 32.50 per acre, appellees to receive as their conviscions all they could mocure above that figure. After some correspondence in regard to the matter appelless claim toat in a conversation between appellant and appellee Erwin on Sebruary 20, 1913, the latter told appellant that they had a chance to sell the 240 acre tract but that appellant refused to sell this wact separately from the other; that subsequently appellees made the mo osition to sell the 240 acre tract to the prospective purchaser thereof at 40.00 an acre, that they (appeliees) themselves sould purchase the 262 acre toot



at 132.50 on acre, and would pay -1.000.00 each down on the latter tract and give a nortgage back for the balance. agreed, but when appelled approached the prospessive purchaser the latter did not want to pay all each for the 240 sers treet, out spread to pay \$5,000.00 cahaand give his note for the valence. About a week ther after, according to the testimony of brwin, he told appellant what the prospective purchaser and agreed to do and claimed that in that conversation appellant stated, in substance, that it cien't make any difference to him whether an elless bound the 262 acre truct or not; in fact, he would rather they would not buy it. the reason given by the prospective purchases of the 240 sere tract for but paying all each was that inorder to raine the money he would have to sell some of the securities he owned at a discount. Arvin testified that appellant told his that he would pay . If of the loss occasioned by the discount in order to get all each for the form; that subsequently the prospective purchaser tendered to ap elless the full emount of the purchase price, \$11,000.00 and appellant refused to convey. "pclient testified that he never at any time agreed to sell the 240 acre truct secarately; that the final agreement with appelle es was that they could sell the 240 sere truct to the respective purchaser at 140.00 on sore thereby giving aprellees of ... Commissions, on condition that appelless purchased the 262 agre tract at 32.00 per acre, paying ther on the /,300.00 commissions received by thea, al e thin addition and the balance in three years without interest. Ap-



ollers ald m. for the intermetention offer not attempt to purchase the 262 sere tract. Appellant aid not, in fact own any of lond. We had a distiple the land, which, on its face was absolute hich was, in fact, a mortgage, and consequently could not have sold the land in any event antil he had produced title thereto. However, this can but certially affect the question at issue. If the contract were as claimed by theappellant, then appelless are not estitled to recover any commissions because they have never attempted nor offered to fulfill their part of the contract; while if the contract was as can tended for by appellees, then their right of recovery is extablushed the vital question is, what were the terms of the contract. On this question the evidence in close and conflicting. Upon the trial appellant offered in evidence the following telegrou which he testified le received from the Western Union Talegroph Us many in the duc course of business; " Louisville, 111. march Stn 1913.

The sourt sustained an objection to the introduction of this telegram on the ground that the original only would be competent. This telegram had a tendency to support appellent's theory that he had never authorized appellees to well the 240 acre timet by itself. The

[&]quot; 1'. ". Johnson,

Binelin tim 11.

[&]quot; Tire us sutharity forthwith to make contract of sale for the two

rwin - Maxwell"



Court erred in refusing to addit it in avidence. The telegral purworted to be sent by appellees at thereon initiative, and they thereby made the tolegraph company their agent. In the case of he Ambeucer-Busch previous Association vs. Il tascher, 127 111.652 the rule so to the admission of telegrans in evidence is very clearly stated as follows:- " The application of the "rule of evidence here contended for must de end upon whether the messives delivered by the telegraph commany to the claimtiff or those delivered by the defendant to the telegraph operator are, as between the parties to this suit, to be deemed the originals. In Darkee v. Vermont Central Laitroad 352 29 Vt. 127, the rule which we consider the most reasonable one is isid down viz., that the original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the tolegraph, is the message delivered to the operator, but where the person conding the message takes the imitiative, so that the telegraph commany is to be regarded as his agent, the original is the massage actually delivered at the end of the line. See also Tavaland vs. Green 40 .is. 431; Western Union Velegraph Co. v Shotter, 71 Ca. 769 Vilson V .d. and ... Weilroad do. 31 Minn. 481; Dun ding v. Loberts, 35 Merb. 463; Gray on Communications by 'elegraph secs. 104 129. The same rule was adorted by this court in Morgan. v. The Leople, 59 311 58.

"The feet that the defendant took he initiative in sending the telegrams, thus employing the telegraph company as its acent,



*is elearly shown by its letters to the plaintiff read in evidence.

**Having thus caployed such agent to convey communications to the graine.

**tiff it must be held to be bound by the acts of its agent to the execution of its agent to the execution of the description of the description of the messages

**constituting them primary evidence of the contents of the messages

east.

In this case there was no suggestion on the triel that the assage was inaccurate, or that appellees did not, in fact, send it.

cross examination that the aut ority which ap elless had for selling the land as verbal one, was asked the following questions and gave the following enswers: " 4 by word of mouth only no writing of any kind or character: A 1 think we had tetteps to that effect too. You say younged letters to that effect before that time: A-1 think we had letters. -b would like to have you produce those letters please.

Q- there are those letters." It the last question an objection was and and sustained on the ground that it was insaterial. If appelled they certainly would be very entered in the tipl of the issues in this case.

direct examination of the appellant after he had detailed the conversation he claims he had with appellee arwin, in regerd to the contract for the sale of the land, he was naked by his
counsel this question: "A Tell the jury whether or not you at say time
modified, or if you did abke any different agreement with ar arwin,
other than that you testified to, made on the 20th?" open this question being objected to the pourt stated in the presence of the jury:"It assumes an agreement was made on that day, that ian't varranted by
The evidence. Tou assume by your question, an agreement was made, the
assumption isn't warranted by want this sitness has testified to; he
Thasn't testified that any agreement was made, he has told a conversation



that took place, between he and Mr. Srvin You are calling that en

the objection to the question might properly have been sustained on theground that it called for mere conclusions; but the ositive statement of the Court that the previous testimony of speciant detailing the correstions he had had withhervin in regard to the terms of the agreement, as he claimed that they were, did not constitute an agreement of any kind, could have no other effect than to destroy appellant's whole defense, and clearly invaded the arowince of the jury.

Three instructions were given for the plaintiffs.

Anch one instructs a verdict and is based solely upon a contract

For the sale of the 240 acre tract of land slone, ignoring entirely

the theory of the defense that the 240 acre tract was not to be sold

unless a pellees also purchased the 262 acre tract, as sentimed

above. The riving of these instructions was also error.

for the errors i diceted judgment must be reversed and the entre remanded.



Relleam Remod Del 11-1915

GENERAL NUMBER 6413.

APPIL TENNS A. D. 1915.

Agenda Number 61.

THE DECATUP PAILEAN & LIGHT

COMPANY,

APOLIANT.

Circuit Court
Macon County.

ELDREDGE, P. J.

200 I.A. 646

Appelled recovered a verdict and judgment in the sum \$2, 500.00 squinet appellant in an action on the case to recover damages for personal injuries claimed to have been received through the negligence of aspellant's servents in the operation of a street car.

from the Union depot a line of double tracts run weet of Eldorade atract to

Broadway, thence couth on Broadway one black East North street, the new west on

East North street. On the north side of East North street about half a block

seet of Broadway it maintains a car barn. Mill street, running north and south,

enters and terminates in East North street on the south side thereof opposite

cald car barn. On the couth side of East North street and on the east side of

Mill street appellant maintains another car barn. Switch tracks run from the

north main track into the car barn on the north side of East North street, and

switch tracks run from the south main track into the car barn on the south side

of enid street,

The accident harmoned about 9:30 e'cleek on the evening of Pebruary

25. 1916. There had been a heavy enow eterm and appellant in cleaning the enos



from the trucke running into the north car barn had piled it up in an emboulant on the east side thereof, which extendes out into the street to within about to feet of the north rail of the north main track.

The cause are submitted to the jury upon the first and sound counts of the declaration. The first count charges, in substance, in t while the plaintiff on the evening in question one riding in a sleigh drawn by a horse upon the street, which was covered with snow, and wherein the defendant End piled upon the north side thereof a bank of snow to a height of three fact so that it became necessary for vehicles going seet in order to pass such joint, to turn could upon the north set of tracke; that while plaintiff one rising in the sleigh point west upon the north cide of the atr et she turned onto the tracks of defendant to woid the ence bank, and that at the time are in the exercise of dus care and coution for her safety; that it a 4 the duty of the defendant to run its care in a reasonable number and to use reasonable care not to strike the vehicle in which plaintiff was riding; but that, not regarding its duty, it can its car upon and a minet the vehicle in a ich plantiff was riling with great force and violence and thereby she was tire a to the ground, and injured, etc.

The record count is based upon the failure of defendant to ring a bell or count some other clars to mark plaintiff that a street our was over-taking the sleich.

Appelled is a surried somm, shout 23 years of me, and on the



evening of the accident was riding in a sleigh drawn by a single horse with two women companions. The evidence for appelles tends to show that she had driven south on Broadway to East North street where she turned west on to East North Street in which direction she drave on the north side of the latter street until she approached the enew bank in the street when she turned south on to the north main tracks and had proceeded west thereon a shorth distance when a street cor operated by appellant struck her sleigh from behind overturning the same and throwing her and one of her companions onto the ground, that before she drove south on to the tracks to wold the snow bank she turned and looked east but saw no car approaching. There was also evidence thinding to show that when this car passed the car barns on its trip east of the deput, the conductor dropped off the cor to sait at the barn until it returned, and that as the car approached the car barn, the metersan, instead of looking should along the track, was watching the car burn for the conductor to get upon the car; and there was also evidence tending to know that as the car proceeded south and west around the corner of Broadway and East North street the trolley thereon slipped off the wire causing the car to become dark, and as there was no conductor on the c.r seme little time elapsed before the metorman could proceed from his position in the car to the rear end thereof to replace the trolley, retake his position and start the car, and it is argued by counsel for appelle: that it was on account of the car being in darkness that appelled failed to see it when she looked back before she turned on to the tracks. There is no evidence that any gong was sounded or warning given of the approach



of the car except immediately before it struck the sleigh, and there is no ewidence that appelled or her companions saw the car before the collision.

The evidence for appellant tended to show that the trolley did not come off, and the car thereby become dark; that the head lights were burning; that the car was proceeding slowly in its usual way, and that the notorman did not see the cleich until it abruptly turned in front of the car too late for him to stop the car before hitting it.

Under this state of the proff the questions of the negligence of appellant, and the contributory negligence of appellae were descrip questions of fact to be determined by the jury and the contention that the variet is contrary to the evidence cannot be sustained.

In the cross examination of the witness, Paby Delong, who was in the sleigh with appelles at the time of the accident, an objection was suctained to the following question;— "Q-Mad you any other accidents or upasts that evening while you were out riding in the cleigh"? It is indicted this was error. Nothing is shown in the record that might make it have any materiality whatever to the issue. A question of the came import was asked of the vitness,

Eve Marie McDeugal, to which an objection was also for the same reason properly sustained. On direct examination of the witness, Madel Young, who was a passenger in the street car at the time of the accident, by counsel for appelled, the was asked if she heard the conductor my saything, and without stating what the conductor said, she answered: "There was scantling said." She was



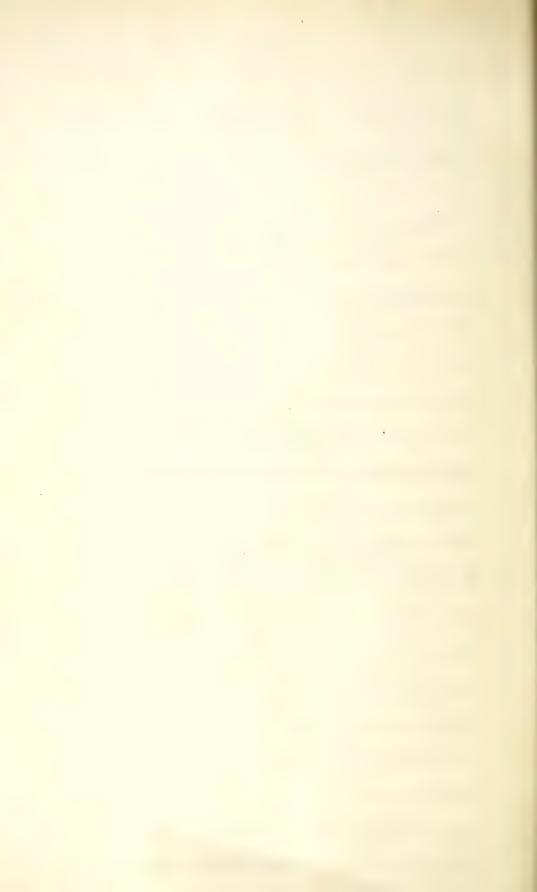
ruled; "State elether or not that fixed in your mind the fact that a sleigh in which some persons were traveling had been struck by the street car upon that occasion?" To which she answered: "I certainly think it did." It is urged that this testimoney was incompetent because the witness did not see the accident and she was thus permitted to testify that an accident happened, and the error, if any, was harmless.

abstract proposition of law as to the respective rights of appelloo and appellant
to the use of the street, and one of the criticisms made thereto is that it does
not refer to the evidence in the case. Abstract propositions of law never
refer to the evidence. An instruction which is based upon the evidence is not

or at true proposition of 1; nor say, and in the factor of the factor instructions and appelled is as follows:-

4 The court instructs the jury that if you believe from a prependerance of the evidence in this case that the servants of the defendant in the operation of the street car in question, in the exercise of ordinary care for the safety of others should have sounded a gong or an alarm of one hind upon the said car to warn the plaintiff of the approach of such car, and that the said car, thile the operation with the sleigh of the plaintiff by reason thereof he is injured, and that the at the time was in the exercise of ordinar care, and that the

" re to 1 defendant failed to sound such gong or other alarm, and that by



reason of such failure, if the prepond reaco of the proif shows any such "failure to sound such a song or other slarm, such collision occurred, then " in such state of the evidence for should find for the plaintiff, if ou "further find from a preponderance of the evidence that the plaintiff, was "injured as a result of such collicion." it is urged that this instruction is errorsous because it assumes a duty upon the part of the motorman to sound a goog at the time and place in question, even though the motorman did not know, and had no reason to expect or anticipate that the plaintiff was upon the street and in such close proximity to the car that she was likely to be struck thereby. We cannot see the force of this criticism in view of the evidence introduced on behalf of appellee. The car which cannot the injury came aroung the curve on to East North street only about half a clock h him the plaintiff. The motorman kann of the estantment of ones thrown across the street by appellant. He must have known that anybody driving west on the north side of the street would have to turn south on to the tracks of the company in order to pass this easbanksont. It was his duty to use reasonable car: in approaching this narro part of the street to avoid injury to persons the might be traveling along the street at said place. It was a dark winter night, and there was some evidence that his motorman, instead of looking shead of his car, was tatching the car larne for the approach of the con actor. It has been repeatedly hold that it is a question of fact for the jury to determine from all the evidence in the case wiether it as negligenes on the part of a motorman on a street

car to told a sound the gong or give a signal warning of his approach. Thus



we held in the case of C. & J. Electric Ry. Co. vs. Barrows, 128 Ill. App. 11. "At the same time the "street car company in charged with the kageledge that the public may lar fully use the entire street and it must, in operating its cars on the streets, use all reasonabl: means to avoid injuring those thom it knows may rightfully use that part of the streets occupied by their tracks. Horth "Chicago Elec. Ry. Co. vs Pouser, 190 Ill. 67; North Chicago Street Railway Co. *vs. Smadraff, 189 Ill, 185. It is the duty of the motormen to exercise ordinary "care to ascertain if the track ahead is clear, and he is bound to notice what "vehicles ahead of his car and near the track are doing, and if he sees one going supon the track or so near it as to be in danger of being struck by the car, to warn the driver of such whicle, and, so far as he is able for the purpose of pro-"vonting a collision, to arrost the progress of the car. South Chicago City "Railway Co. v. Kinnare, Ador. 96 Ill. App. 215. It is a question of fact for "the jury thether or not the boll or gong should have been sounded and thether or it was negligence "not the --- at er a tray ler to attempt to ero. In truck dar a religious "Chicago U. Tr. Co. v Jacobson, 217 Ill. 404; C. & P. St. Ry. Co. vs Maianor, "160 Ill. 320; Canfield v. North Chicago Street Ry. Co., 98 Ill. App. 5." Nor mio we think this instruction is in conflict with instruction number 6 given for appellant, which, in substance, told the jury that if appelled sud only and unexpectedly and without the knowledge of the defendant, drove the sleigh upon the defendant's tracks a ' warely placed herealf in a position of deager; then in order to charge the defendant with a daty to avoid injuring her, the plaintiff must nee in the case that the circumstances were of show by



become conscious of the facts giving rise to such duty, and a reasonable opportunity to become conscious of the facts giving rise to such duty, and a reasonable opportunity in the same of ordinary case and callies to priors much may, (a) latter instruction and by same in the application of the rate announced in a man to fourth instruction to an hypothesis of fact favorable to appollant, and there is no conflict between the two instructions.

The fifth instruction given for appellee is as follows: \$\$15 a The court instructs the jury that if a person is in the exercise of reast. Table care for his own safety and is suddenly placed in a position of paril by "another, he is not required to exercise the highest degree of care to wave Thissolf from injury but is only required by the law to use the care that an "ordinarily careful and prudent person would have exercised under similar sireum-"stances to those in which he was then placed." This instruction should not have been given, as there was nothing in the syldence to warrant it. Appellet had no knowledge of the approach of the car until it struck the aleigh, and t sequently there was no issue in the case as to the degree of cure she whoul used upon being suddenly placed in a position of peril; but we do not think that that any harm to aspellant resulted there from or that the giving of this instruction is such an error a should cause a reversal of the judy sat. The isomes in the cause wors thoroughly and definitely defined by the instructions as a shale, and those iven for appollant protect every phase of its limitity.

In support of the potion for a new trial an offidavit of H. C. Thito,



and the claim is not made that on account of said emission, appellant was taken by surprise by the evidence of the provision as to the extent of appellant injuries as for this reason a new trial should have been granted. There is nothing in the affidavit to show that the witness wilfully misrepresented anythin appellacte injuries, and from aught that appears from the affidavit some of the roults of the injury may have developed after the interviews of the line.

We are of the opinion there is no rear full the in the result, until the judgment is therefore efficient.









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